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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944 45

No. 1165 59

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HENRY BOMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

FILED APRIL 18, 1945

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1159

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

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1 [Caption omitted.]

2 In United States District Court, Western District of Texas

Civil Action Docket No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CON TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

vs.

UNITED STATES OF AMERICA

Basis of Action—Suit to recover the sum of $6,937.76, Federal Estate Tax, paid to Frank Scofield, Collector of Internal Revenue by pltf. and alleged to have been illegally collected, and for interest and costs of suit.

Date	Filings—Proceedings	Pltf.	Dept.
Nov. 10, 1944—	1. Petition filed in duplicate	$15.00	------
Nov. 11, 1944—	Issued Summons, Copies and Copies of complaint for service	------	------
Nov. 13, 1944—	2. Summons filed Ex. 11-11-44, by Bain, Deputy Marshal	------	------
Dec. 1, 1944—	3. Answer filed in duplicate	------	------
Feb. 12, 1945—	4. Stipulation filed—oral arguments heard	------	------
Mar. 2, 1945—	5. Opinion of the Court filed	------	------
Mar. 7, 1945—	6. Judgment for Plaintiff in the sum of $6,937.76 with interest at 4% from date	------	------
Mar. 9, 1945—	7. Motion to Amend Findings of Fact and Conclusions and to Correct amount of Judgment, filed	------	------
Mar. 13, 1945—	8. Order denying Defendant's Motion to Amend Findings and Conclusions and Correcting amount of Judgment	------	------
Mar. 30, 1945—	9. Petition for appeal to Supreme Court U. S., filed	------	------
Mar. 30, 1945—	10. Statement as to Jurisdiction, filed	------	$5.00
Mar. 30, 1945—	11. Assignment of Errors, filed	------	------
Mar. 31, 1945—	12. Order Allowing Appeal, entd	------	------
Mar. 31, 1945—	13. Statement, filed	------	------

Date	Filings—Proceedings	Pltf.	Dept.
Mar. 31, 1945—14.	Service of Instruments Required by Rule 12, Paragraph 2, of Revised Rules of the Supreme Court, filed	------	------
Mar. 31, 1945—15.	Praecipe for Transcript of Record, filed	------	------

3 In United States District Court, for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CON TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

vs.

UNITED STATES OF AMERICA

Complaint

Filed Nov. 10, 1944

To the Honorable WALTER A. KEELING, United States District Judge:

Henry Rompel, Jr., Administrator de bonis non with the will annexed, of the Estate of Ernst Herbst, Deceased, hereinafter styled plaintiff, complaining of the United States of America, hereinafter styled defendant, respectfully alleges:

I

The plaintiff is a citizen of the United States and of the State of Texas, and resides in New Braunfels, Comal County, Texas, which is in the San Antonio Division of this Court. The decedent was also a citizen of Texas, and a resident of said City, County, and State at the time of his death, and his Estate is being administered in Comal County, where the decedent's will was probated by the County Court of Comal County, and plaintiff is authorized to bring this suit and to take all other actions taken by him in connection therewith.

This plaintiff was duly appointed by said Court as Successor to Natalie Herbst, Executrix of said Estate, who died before the administration of the Estate was completed, the said Natalie Herbst having been named as Independent Executrix in the will

and Paul Sultenfuss, who was named therein as Successor Executor, having also died prior to the appointment of this plaintiff as Administrator. Said administration is still pending with the plaintiff as Administrator.

II

This suit involves a claim against the United States of America for less than Ten Thousand Dollars ($10,000) including principal and interest, and the cause of action arises under the Revenue Laws of the United States, and this suit is one over which the District Courts of the United States are given original jurisdiction under Subdivision 5 and Subdivision 20 of Section 41 of Title 28, U. S. C. A., being a suit involving claim for refund of revenue taxes.

III

On or about the 5th day of July 1944, the plaintiff paid to Frank Scofield, Collector of Internal Revenue for the First Collection District of Texas, at Austin, Texas, the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), being the full amount of Federal Estate Tax claimed by the United States of America after crediting on the amount of that tax the full amount of the basic Federal Estate Tax which was due to and paid to the State of Texas. Said payment to said Collector was made under protest and solely to avoid the imposition of penalties and interest which would otherwise have been asserted, claimed, and collected by the United States of America. The plaintiff contemporaneously protested the payment of said tax, and subsequently on or about July 14, 1944, duly filed with the said Collector of Internal Revenue of the United States a Claim for Refund based upon the facts and claims herein set forth. This Claim for Refund was duly presented to the Commissioner of Internal Revenue of the United States, who rejected said Claim on the 31st day of October 1944.

IV

Plaintiff alleges that the amount paid by him was claimed by the United States Government on the basis of reports prepared by its Internal Revenue Agents, the originals of which are not in the possession of the plaintiff and production thereof is demanded of the defendant.

V

Plaintiff alleges that the facts set forth in the Claim for Refund filed by him are true, and are as follows:

Ernst Herbst, husband of Natalie Herbst, died at New Braunfels, Texas, on November 17, 1943, leaving her and their child and grandchildren surviving. An estate tax return was filed in due course with respect to his estate by Henry Rompel, Jr., Administrator de bonis non with the will annexed, who is duly qualified and is now acting as such Administrator. As reported, the gross estate amounted to $58,177.51 and the deductions claimed therefrom to $5,233.45. Said return disclosed no estate tax liability. The gross estate, as returned, consisted of an undivided one-half of the property owned in community by the decedent and his surviving wife at the date of the decedent's death, none of which had been received as compensation for personal services actually rendered by either spouse or derived originally from such compensation or from separate property of either spouse. The only separate property of either spouse was one item of real estate which was the separate property of the decedent of an agreed value of $12,831.20. All of said property was located in Texas.

6 The decedent and wife were married at Bulverde, Texas, on February 12, 1901. They continued to reside together in Texas until the decedent's death. Decedent by his will, which was duly probated, undertook to devise only his one-half of the community property to the beneficiaries named therein.

This estate tax return was investigated in due course by Internal Revenue Agent, J. N. Keith, attached to the office of the Internal Revenue Agent in Charge at Dallas, Texas. Upon such investigation, it was held that there should be included in the gross estate of the decedent in addition to his separate property aforesaid, all of the property held in community by the decedent and his surviving wife at the date of the death of the decedent. It was also held by said Revenue Agent that there should be included in the decedent's gross estate $2,500 representing the proceeds of three certain policies of life insurance upon the life of the decedent, of which policies decedent's surviving wife was the sole beneficiary. All of these policies had been acquired during the marriage between decedent and his surviving wife, and all premiums paid thereon had been paid from community funds, and, immediately prior to the death of the decedent, all of the rights of ownership, equities, and values attaching to said policies belonged to the aforesaid community estate, and had so belonged since the several policies were acquired. Said agent also adjusted the values at which various items of property had been returned in the aforesaid tax return. These adjustments as to

value have been agreed to by the administrator, and are not in question here.

7 Because of the aforesaid, the agent determined that the decedent's gross estate amounted to $115,615.19, the deductions therefrom $5,541.83, and the estate tax liability, after giving full credit for State Inheritance Tax, to $6,937.76.

All of the estate tax so paid to the aforesaid Collector is attributable solely to the fact that the agents of the Bureau of Internal Revenue included as a part of the decedent's gross estate, for the purpose of determining the estate tax due under Chapter 3 of the Internal Revenue Code, all of the property which at the date of decedent's death belonged to him and his wife in community, and all of the proceeds of life insurance upon the life of the decedent, and did not include therein only that one-half of the property so held in community which was owned by the decedent at the date of his death, and did not include only one-half of the proceeds of the life insurance upon the life of the decedent. The surviving wife's share (one-half) of said community property was so included in decedent's gross estate because, and only because, of the provisions of Section 402 (b) of the Revenue Act of 1942, amending Section 811 (e) of the Internal Revenue Code, and all, rather than one-half, of said insurance was so included in decedent's gross estate because, and only because, of the provisions of Section 404 (a) of the Revenue Act of 1942, amending Section 811 (g) of the Internal Revenue Code.

VI

Plaintiff says that the aforesaid tax so paid, with interest thereon as provided by law, should be refunded to plaintiff

8 because said Section 402 (b) and said Section 404 (a) of the Revenue Act of 1942, and each of said sections, are invalid and unconstitutional, and the said tax so collected by reason thereof is an invalid and unconstitutional tax.

The terms, purpose, and effect of said Section 402 (b) and Section 404 (a) of the Revenue Act of 1942, respectively, are:

To impose an estate tax measured in part by property which did not belong to the estate of the decedent; which had never belonged to the decedent and which did not pass by reason of the death of the decedent, and as to which, neither the decedent's death nor any prior act of decedent, increased the rights, title, ownership, or control of the actual owner (the surviving spouse) of the property so used to measure the tax.

To impose an estate tax (such a tax being an excise), which is not uniform throughout the United States, but which is by its express terms limited in scope and application to limited areas

of the United States, to wit, those States having the community marital property system.

To impose a direct tax which is not a tax on income and which is not apportioned among the several states of the United States in accordance with their population or upon the basis of a census or enumeration taken as provided in the Constitution of the United States.

To regulate, change, or control the marital property system in force in Texas (the State of decedent's residence) and other states having the community marital property system and thus to exercise powers not vested in the Government of the United
9 States but reserved to the several states of the United States and the people thereof.

To impose a wholly arbitrary, capricious, and confiscatory tax retroactive in its operative effect and to create wholly arbitrary and capricious presumptions of law and fact.

To impose (so far as life insurance is concerned) a tax on that portion of the proceeds of life insurance which is not payable to or for the benefit of the decedent's estate and where as to said one-half the insured neither paid the premiums on the policies nor possessed any legal incidents of ownership therein.

For these, and other reasons, said Section 402 (b) of the Revenue Act of 1942, and Section 811 (e) of the Internal Revenue Code, as amended thereby, and Section 404 (a) of the Revenue Act of 1942, and Section 811 (g) of the Internal Revenue Code, as amended thereby, and the imposition and collection of the tax violate the following and other provisions of the Constitution of the United States and the amendment thereto:

(1) Art. 1, Sec. II, 3rd Clause, of the Constitution of the United States, providing that direct taxes shall be apportioned among the several States in accordance with their population.

(2) Art 1, Sec. VIII, 1st clause of the Constitution of the United States, providing that all duties, imposts, and excises shall be uniform throughout the United States.

(3) Art 1, Sec. IX, 4th Clause, providing that no direct tax shall be laid unless in proportion to a census or enumeration taken, as provided in said Constitution.

10 (4) That portion of the Fifth Amendment to the Constitution of the United States which provides that no person shall be deprived of property without due process of law and that private property shall not be taken for public use without just compensation.

(5) The Tenth Amendment to the Constitution of the United States, providing that all powers not granted to the United States by the said Constitution, and its Amendments, are reserved to the several States and the people thereof.

In addition, plaintiff asserts that said Section 402 (b) of the Revenue Act of 1942, and Section 811 (e) of the Internal Revenue Code, as amended thereby, and Section 404 (a) of the Revenue Act of 1942, and Section 811 (g) of the Internal Revenue Code, as amended thereby, and all Regulations of the Bureau of Internal Revenue pursuant thereto, violate the Constitution of the United States and amendments thereof, and are void and invalid, and the estate tax imposed thereunder is unconstitutional and invalid and said tax should be refunded.

VII

Plaintiff further says that because of the facts herein set forth no liability for Federal Estate Tax exists against said Estate either under Section 810 of the Internal Revenue Code, or Section 935 of the Internal Revenue Code, or otherwise.

VIII

The only persons interested in the Claim on which this suit is based are the beneficiaries of the Estate of the decedent, Ernst Herbst, under voluntary bequests made to them by his will,
11 and no assignment or transfer of said Claim, or any part thereof or interest therein has been made, and plaintiff in his capacity as Administrator is justly entitled to recover the amount herein claimed from the United States after allowing all just credits and offsets, and this plaintiff and the said Ernst Herbst and the beneficiaries of his Estate are all citizens of the United States, and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and the facts as stated in this petition are true to the best of the knowledge and belief of this plaintiff and of the beneficiaries of the Estate.

Wherefore, premises considered, plaintiff prays that service be had upon the defendant as provided by the statutes and the Rules of the Court by serving a copy of the summons and complaint herein on R. W. Smith, Jr., the United States Attorney for the Western District of Texas, at his office in San Antonio, Texas, and by sending by registered mail copies thereof to the Attorney General of the United States and to the Commissioner of Internal Revenue, at Washington, District of Columbia; and that upon hearing this plaintiff have and recover judgment against defendant for the amount of the tax paid in the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), to-

gether with interest and for costs of Court and for all other proper relief and remedies.

HARRY C. WEEKS,
Forth Worth, Texas,
J. PAUL JACKSON,
Dallas, Texas,
PALMER HUTCHESON,
Houston, Texas,
R. N. GRESHAM,
San Antonio, Texas,
Attorneys for Plaintiff.

12 [*Duly sworn to by R. N. Gresham; jurat omitted in printing.*]

[File endorsement omitted.]

13 In United States District Court

[Title omitted.]

Answer

Filed Dec. 1, 1944

Comes now defendant by its attorney, William Robert Smith, Jr., United States Attorney for the Western District of Texas, and in answer to plaintiff's complaint admits, denies, and alleges as follows:

I

Admits the allegations contained in paragraph I of plaintiff's complaint.

II

Admits the allegations contained in paragraph II of plaintiff's complaint.

III

Admits the allegations contained in paragraph III of plaintiff's complaint.

IV

Answering paragraph IV of plaintiff's complaint, defendant avers that the papers and matters therein alleged are incompetent and immaterial.

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V

Admits the allegations contained in paragraph V of plaintiff's complaint, except avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that no part of the community property shown on the federal estate tax return had been received by decedent as compensation for personal services actually rendered by him, or derived originally from such compensation or from separate property of decedent.

VI

Denies all the allegations contained in paragraph VI of plaintiff's complaint.

VII

Denies all the allegations contained in paragraph VII of plaintiff's complaint.

VIII

Admits the allegations contained in paragraph VIII of plaintiff's complaint, not hereinabove denied, except denies that plaintiff is entitled to recover.

Wherefore, having fully answered defendant prays judgment dismissing plaintiff's complaint and for costs.

W. R. SMITH, JR.,
United States Attorney.

[File endorsement omitted.]

15 In United States District Court

[Title omitted.]

Stipulation as to certain facts

Filed Feb. 12, 1945

The parties to the above-entitled and numbered cause, acting by and through their duly authorized attorneys of record, hereby agree and stipulate that upon the trial of this cause, and in all subsequent proceedings in said cause, the facts hereinafter stated (in addition to the facts alleged in the complaint filed herein by the plaintiff and admitted in the answer herein filed by the defendant) shall be taken as true, and as if established by competent evidence introduced and received at the trial of said cause. It is stipulated that this cause shall be submitted on this agreed statement of facts and the pleadings.

I

The following summary accurately discloses the method employed by the taxing officers of the defendant in determining decedent's taxable estate (because of the small amount of taxes involved in the insurance issue, plaintiff waives any claim relative thereto):

Separate property of decedent

1. An undivided 1/7th interest in approximately 9,331.85 acres of ranch land in Kinney County, Texas—Valued at	$12,831.20

Community property of decedent and surviving wife

2. Approximately 2,769.09 acres of ranch land in Comal County, Texas—Valued at	30,657.06
3. Lot in New Braunfels, Texas—Valued at	2,250.00
4. 2/3rds interest in Lot in New Braunfels, Texas—Valued at	1,000.00
5. Lot in San Antonio, Texas—Valued at	4,700.00
6. Lot in San Antonio, Texas—Valued at	1,700.00
7. Stocks and Bonds—Valued at	13,607.52
8. Mortgages, notes, and cash—Valued at	45,169.44
9. Proceeds of Life Insurance on decedent's life	2,500.00
10. Miscellaneous property—Valued at	1,200.00
Total gross estate	115,615.19

Deductions

Funeral Expenses	1,733.45
Executor's commissions	1,250.00
Attorneys' Fees	1,500.00
Miscellaneous administration expenses	975.00
Debts of decedent	83.38
Total deductions	5,541.83
Total estate tax liability before allowance of credit for State Inheritance Tax	7,018.34
Net estate tax after allowance of credit for State Inheritance tax	6,937.76

II

From the date of his marriage on February 12, 1901, until 1934, the decedent's principal business activity was that of raising livestock or ranching. This business was conducted on the ranch referred to as Item (2) in the schedule set forth in the preceding paragraph. Decedent and his wife lived on this property during the greater portion of their married life. This property was acquired largely on the credit of and paid for out of savings from the aforesaid ranching business. The residue was saved and invested from time to time. These savings, except to the extent that the rentals from decedent's separate property hereafter dealt with

contributed thereto, ultimately resulted in the acquisition and ownership of the property listed as community property in Paragraph I of this stipulation.

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III

On the 20th day of October 1937, the decedent inherited from his brother an undivided one-seventh (1/7) interest in approximately 9,331.85 acres of ranch land in Kinney County, Texas. This is the real estate referred to as Item (1) in the schedule set forth in Paragraph I of this stipulation. After he inherited this undivided interest in the aforesaid land, the decedent rented his interest therein at an annual rental of approximately Four Hundred ($400.00) Dollars. As he received these rentals they were deposited in the bank account in which he deposited receipts from all other sources, and from which all personal and family expenses were paid, as well as all business expenses and the cost of investments. The decedent did not segregate or maintain the identity of these rental receipts.

IV

In 1934, the decedent and his wife moved from the ranch, referred to in Paragraph II of this stipulation, to the town of New Braunfels, Texas, where they lived until the decedent's death. After this move, this ranch was rented to the decedent's son-in-law at an annual rental of approximately Nine Hundred ($900.00) Dollars per year. In addition to this rental, approximately Two Hundred ($200.00) Dollars per year was received for hunting leases upon this ranch. After moving to New Braunfels, the decedent confined his business activities to making loans and investments out of the aforesaid savings and receipts and to attending to the same. During their marriage, neither the decedent nor his wife was ever employed by anyone at a wage or a salary, and neither received, during that time, any commissions, fees, or similar compensation for personal services rendered to another. All of the community property described in Paragraph I of this stipulation represented accumulations and savings from the

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business of raising livestock and rentals, interest, and dividends on properties acquired with these savings, except to the extent that the rentals derived from the interest in the aforesaid ranch property in Kinney County, Texas, inherited by the decedent as above set forth, may have gone into these investments.

In witness whereof, this stipulation has been executed upon behalf of the parties to the above-entitled and numbered cause, by

their respective attorneys of record, this 9th day of January A. D. 1945.

HARRY C. WEEKS,
PAUL JACKSON,
RUPERT N. GRESHAM,
PALMER HUTCHESON,
Attorneys for Plaintiff.
W. R. SMITH, Jr.
U. S. Attorney,
J. M. BURNETT,
Ass't. U. S. Attorney,
Attorneys for Defendant.

[File Endorsement Omitted.]

19 In United States District Court for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Judgment

Filed March 7, 1945

Be it remembered that on the 12th day of February 1945, this cause came on for trial and the Plaintiff announced ready through his attorneys, and the Defendant, United States of America, announced ready through the United States Attorney, and the parties in open Court announced that the case was submitted to the Court for decision upon the Stipulation of Facts filed therein and the allegations of Plaintiff's petition, as admitted in the Defendant's answer.

And it appearing to the Court that it has jurisdiction over the parties and the cause of action asserted by the Plaintiff, and that Plaintiff has fully complied with all requirements for the institution and maintenance of this suit in this Court and is entitled to recover the full amount of his claim, and the Court having filed herein an opinion of the Court dated March 2, 1945, setting forth the specific findings by the Court of the facts therein and the conclusions of the Court upon all questions of law involved in the case, and rendered judgment thereon;

It is now hereby ordered, adjudged, and decreed, that the Plaintiff, Henry Rompel, Jr., Administrator de bonis non cum
20 testamento annexo of Ernst Herbst, Deceased, do have and recover against the United States of America judgment for the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), together with interest thereon from March 2, 1945 at the rate of four per cent (4%) per annum.

To the action of the Court in entering this judgment, the United States Attorney duly excepted in behalf of Defendant.

ALLEN B. HANNAY,
United States District Judge.

[File endorsement omitted.]

21 In the District Court of the United States for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

R. N. Gresham, San Antonio, Texas; Palmer Hutcheson, Houston, Texas; J. P. Jackson, Dallas, Texas; and Harry C. Weeks, Fort Worth, Texas, for the Plaintiff.

Samuel O. Clark, Jr., Asst. Attorney General; Andrew D. Sharpe, Helen R. Carloss, and James P. Garland, Special Assistants to the Attorney General, and W. R. Smith, Jr., United States Attorney, for the Defendant.

Findings, conclusions, judgment, and opinion filed March 2, 1945

This suit was brought under the Tucker Act (Sections 761–5, Title 28 U. S. C. A.) to recover an estate tax assessed against and collected under protest from the plaintiff with respect to the estate of Ernest Herbst, a Texas citizen, who died November 17, 1943. This tax resulted from the defendant's inclusion in the decedent's gross estate of all of the community property which belonged to the decedent and his wife, and which had been accumulated by them in Texas, at the date of decedent's death, rather than one-half thereof. This, the parties admit, is required by the provisions of Section 402 (b) of the Revenue Act of 1942. Plaintiff timely filed claim for refund, which was rejected, and relies for recovery upon

his properly pleaded contention that this Section violates various provisions of the Constitution of the United States. The defendant asserts the Section is valid. If the Section is unconstitutional, the plaintiff is entitled to recover all of the tax paid, for the decedent's separate estate plus one-half of the community estate (less deductions not in controversy) amounts to less than the statutory exemption of Sixty Thousand Dollars ($60,000.00) prescribed by the 1942 Act (Section 935 (c) I. R. C. as amended). If the Section is not unconstitutional and void, plaintiff admits that he is entitled to recover nothing.

No evidence having been introduced, the Court finds as the facts the allegations of fact contained in the complaint, to the extent they were admitted by defendant's answer, and the additional facts contained in the written stipulation filed herein by the parties. These are incorporated here by reference.

The Court concludes:

1. Section 402 (b) of the Revenue Act of 1942 is unconstitutional and void, being in conflict with the requirements as to due process contained in the Fifth Amendment to the Constitution of the United States, as well as with the requirement of uniformity for an excise tax contained in Article 1, Section 8, Clause 1, of the said Constitution.

2. Plaintiff is entitled to recover from defendant the aforesaid sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76) heretofore collected from plaintiff, with interest from the date of judgment, as provided by law.

The constitutional questions presented by plaintiff must be decided, for there is no way to construe Section 402 (b) of the Revenue Act of 1942 so as to avoid necessity for such a decision. The responsibility thus imposed upon the Court is fully appreciated, and were it possible to decide the rights of the parties by a construction which would avoid the constitutional problems the Court would do so.

The factual situation presented by this record is a typical one—one which, with minor and unimportant variations, exists as to many husbands and wives in Texas. Herbst and wife had no property at the time of their marriage in 1901. Until 1937 neither acquired any property by gift, devise or descent. Neither ever received compensation for personal services rendered to anyone. He, a stock farmer, and his farmer wife, living together on a small ranch acquired after marriage largely on credit, gradually acquired a comparatively substantial estate which, as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife. The separate property acquired by the decedent in 1937 and which was on hand intact at his death, did not contribute

materially to the accumulations, and need not enter into the consideration of the problem involved.

Before passing on the constitutional questions raised, it is necessary to examine the rights and title of the decedent and his surviving wife in the community property owned by them at the time of his death.

The community law of Texas stems from the civil law, and it has been the law of Texas as far back as any historical record exists. It was the law of the Spanish Empire when Texas was a part thereof. It was the law of the Republic of Mexico when Texas was part of Mexico. It was the law of the Republic of Texas when Texas was a Republic. And it was the law of Texas when Texas was admitted to the Union in 1845. Prior to, and as a condition of Texas becoming a part of the Union, Congress by joint resolution provided that Texas was to adopt a Constitution acceptable to the Congress, and pursuant thereto the Constitution of 1845 was adopted preserving therein the community property system as then recognized in Texas. It has remained the fundamental law of Texas, without the change of a single word in the Texas Constitution, from that date. It was important to note that this occurred many, many years before any Federal Estate Tax legislation was ever had. Thus Texas community property law is embedded in and forms a part of the State policy of Texas. Hopkins v. Bacon, 282 U. S. 122. And this State law establishes a rule of property which the Federal Court is bound to follow. Warburton v. White, 176 U. S. 484, *496*; Tyler v. United States, 281 U. S. 497, *501*. It is neither a contractual nor consensual system, but an ancient body of law forming an important and integral part of the fundamental law of Texas, and results, not from voluntary agreements of the parties, but by operation of law, as a vital incident of the marriage relation. Compare Commissioner v. Harmon, 323 U. S. —).

Under this community system, the wife is an equal owner with her husband in all of the community property. Their rights, title and interest are coequal and of equal dignity. The wife does not take her title through or under the husband. Her interest is an absolute, vested property right. The husband never owned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition and continued uninterruptedly to hold such title as long as the property remained an asset of the community. The husband owns no interest in the wife's portion of the property which terminates with his death. He cannot, and in the instant case he did not undertake to, dispose of her interest by will. On his death, his one-half interest in the property passed to his legatees and devisees. The wife simply

retained an equal interest in the property which she owned as coowner prior to her husband's death.

23 The wife enjoys full power of testamentary disposition of her one-half interest in the property, having the unqualified right to will it to whom she chooses. At her death without a will her interest passes to her heirs at law.

The relationship of the spouses in Texas during their lifetime is substantially that of partners in a commercial partnership, and the husband and wife are in all respects equal partners, the husband being the managing partner and vested with management powers. The husband, as managing partner, stands in a fiduciary relation to his wife, and must act in good faith in the handling of her interest in the property, and should he defraud or attempt to defraud his wife's interest, she may have redress against him or against her property in the hands of a third party. He must account to her strictly if his power of management is used to impair her community interest. Bad faith is not the criterion. He is the trustee, and is accountable as such. Arnold v. Leonard, 114 Texas 535, 273 S. W. 799.

In the case of divorce she has the right to her one-half, and if no property settlement is made on divorce the parties each continue to hold one-half thereof as tenants in common.

Should her husband, the managing partner, become insane, imprisoned, or otherwise incapacitated, or should he abandon her, she may succeed to the management of the community estate. At his death she, as surviving partner, is charged with winding up the affairs of the connubial partnership.

The wife is liable for income taxes on the property which represents her one-half interest of the partnership income. At her death her legatees and heirs are liable for Texas inheritance taxes on her one-half of the community property, just as the husband is on his half only. Jones v. State, 5 S. W. (2d) 973. At her death, her estate must pay federal estate taxes upon her one-half interest, even under the terms of the Act in question, just as she and her husband have been paying on their respective half interests only, with full approval prior to the 1942 Act. T. D. 2450 and 3670.

It is clear from the foregoing summary that in Texas the wife is a full equal co-owner with her husband of the community partnership assets. The Supreme Court of Texas has repeatedly so held. Wright v. Hayes, 10 Tex. 130; Burnham v. Hardy Oil Co., 108 Tex. 555; Patty v. Middleton, 82 Tex. 586; Wheat v. Owens, 15 Tex. 242; Wood v. Wheeler, 7 Tex. 13; Arnold v. Leonard, supra; Jones v. State, supra; Blackmon v. Hansen, 169 S. W. (2d) 962. The Supreme Court of the United States has likewise repeatedly recognized that the rights of the two spouses are equal,

under community property law. Warburton v. White, 176 U. S. 484; Arnett v. Reade, 220 U. S. 311; Poe v. Seaborn, 282 U. S. 101; Hopkins v. Bacon, 282 U. S. 122. As the Supreme Court stated in Hopkins v. Bacon, supra, at pp. 125 and 126, involving community income of spouses domiciled in Texas, the wife "has a proprietary vested interest in the community property such as makes her an owner of one-half of the community income. * * * The interest of a wife in community property in Texas is properly characterized as a present vested interest, equal or equivalent to that of her husband."

When Section 402 (b) (2) of the Revenue Act of 1942 is examined against the background of the foregoing summary of the Texas law, it becomes apparent that the statute in controversy violates the due process clause of the Fifth Amendment. That Section provides that all community property (the survivor's half as well as the decedent's half) shall be included in the decedent's estate, with two exceptions:

(a) Community property derived originally from compensation for personal services of the surviving spouse; and

(b) Community property derived originally from separate property of the survivor.

Community property acquired during marriage may be derived from a variety of sources not within either of the above exceptions. For example, property acquired with borrowed money, as in this case; property acquired with commingled funds; property acquired from gainful occupations, where neither spouse received compensation for personal services actually rendered, and where one of the spouses is engaged in his or her own independent
24 business, or where both are so engaged, such as farming, merchandising, ranching, manufacturing, or any other independent business; property acquired from earnings of minor children; property acquired as damages for tort; property acquired through speculation; property acquired by adverse possession; property acquired from other sources than salaries or wages.

It is stipulated in this case that the ranch, which was the principal source of the community accumulation, was acquired largely on credit. It is further stipulated that neither party derived compensation for personal services. It is likewise clear from the stipulation and agreed facts that, except to a negligible extent, none of the community resulted from the separate property of either spouse. It follows, therefore, from the agreed facts that the community property in question would not fall within either exception of the statute, and it is therefore that type of community property that is taxed under the statute to the full extent as a part of the estate of the spouse who died first.

This statute clearly violates due process, first, because it taxes this decedent's estate with his wife's property. The Supreme Court has repeatedly held that a tax on A measured by B's property is void because violative of due process. Hoeper v. Wisconsin, 284 U. S. 206; Knowlton v. Moore, 178 U. S. 41; Heiner v. Donnan, 285 U. S. 312; Frew v. Bowers, 12 Fed. (2d) 625; Hartman v. Greenhow, 102 U. S. 672; Nichols v. Coolidge, 274 U. S. 531; Coolidge v. Long, 282 U. S. 582; Schlesinger v. Wisconsin, 270 U. S. 230. See also Succession of Weiner, 203 La. 649, 14 So. (2d) 475, where it is said:

"And yet, we are asked to place an interpretation on Act No. 119 of 1932, and Section 402 (b) (2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife."

Again, this statute is more arbitrary and capricious in other respects. It is not only taxes or attempts to tax the decedent for property which he did not own, but it also taxes property which he never owned and which he could not and did not transfer at his death. And the surviving wife is again taxed on her half of the property when she dies, with the result that the identical property is taxed to each of the two spouses, once to the spouse who owned, and once to the spouse who did not. This is double taxation. Moreover, each is reciprocally taxed on the other's property. Such results in not only 'taxation but spoilation'. Had Mrs. Herbst predeceased her husband, the statute would have required the inclusion of all of the community property here involved in her estate. The sheer accident of his prior death, and not any title or interest of Mr. Herbst in his wife's portion of the community property, has resulted in the present effort to tax the same as a part of his estate. However, had the wife predeceased the husband, she would have been deemed the owner and been taxed on the full amount thereof. Such a statute is clearly arbitrary and capricious and confiscatory and violates due process.

Moreover, the statute requires an investigation of all transactions over a long married life in order to determine whether each item of property on hand at the time of death was derived originally from the separate property or the earnings of the survivor.

If the exception of "compensation for personal services" as used in Section 402 (b) is to be given its ordinary meaning, that is, receipts for personal services rendered to someone else, or "earned income" (McLarry v. Commissioner, 30 Fed. (2d) 789; Graham v. Commissioner, 95 Fed. (2d) 174), then, under the facts in this case, there is no problem in tracing the origin of the community

property here involved, for it is stipulated that neither spouse at any time during marriage received salaries, fees or similar compensation; but if, as the Government's counsel suggests, the term is to be broadened to include the gain from any business activity embracing personal efforts, then there would be in this case a problem of tracing which could not be solved. The parties here were married for 40 years. It would be a physical impossibility for the executors in this case, or any case such as this, after the death of the one most familiar with the business transactions, to trace every item of property on hand at death back through various mutations and changes for 40 years, to determine its origin. Never before have spouses found it necessary to maintain detailed records of their respective contributions to their joint estate. And even if records had been kept, they would not have enabled the executors to meet the burden imposed upon them by this law. It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate. Their respective services, no matter how detailed their records may be, are impossible separately to evaluate. Thus the statute imposes burdens of proof impossible of being met.

Moreover, under this law, the property in this case is presumed to be owned entirely by the husband merely because he died first. At the same time, had the wife died first, the statute would have presumed the same property to be owned entirely by the wife. The statute thus creates arbitrary and capricious presumptions contrary to law, to fact, and to human and economic experience. There is no reasonable connection between the fact proved and the fact presumed. These arbitrary presumptions and these impossible burdens of proof clearly violate the Fifth Amendment. Mobile J. & K. C. R. Co. vs. Turnipseed, 219 U. S. 35; McFarland v. American Sugar Refining Co. 241 U. S. 79; Tot v. U. S. 87 L. Ed. 1519; Manley v. Georgia, 279 U. S. 1; Bailey v. Alabama, 219 U. S. 219; Heiner v. Donnan, supra; Schlesinger v. Wisconsin, supra.

Furthermore, the statute, in the Court's opinion, violates due process in that it ascribes significance to the origin of wealth, and thus in effect taxes decedent at death with respect to transactions occurring many years previously, innocent in nature, and not testamentary in character. The statute looks to the acquisition of the community property, and attempts to make the tax fall, in the language of the Committee Report, on the one to whom the property is "economically attributable." It is therefore a retroactive statute, taxing past transactions unrelated to

death, and is therefore more capricious and pernicious than other retroactive statutes condemned by the Supreme Court. Untermeyer v. Anderson, 276 U. S. 440; Nichols v. Coolidge, supra; Coolidge v. Long, supra. See also In Re Pell, 171 N. Y. 48, 63 N. E. 789; In Re Clark's Estate, 74 Pac. (2d) 401.

Under the foregoing cases, property rights previously vested in another may not be included in the decedent's estate for estate tax purposes, even though the property rights involved had been created by the decedent in the lifetime, donatively and under circumstances where he retained some interest in the property. A fortiori, Congress may not in this case include by a retroactive statute the interest of the wife in community property, where such interest was fully vested many years prior to her husband's death, and where her rights were not donatively created by the husband, but arose by operation of law as an incident of the marriage, many years prior to the first estate tax law, and where the husband never had any beneficial interest therein.

It is argued that at the husband's death there is a shift of property interests in that at his death the wife would have the management. Death of the husband did of course terminate his managerial control over the community property. However, his death would not result in an enlargement of the wife's property rights. Her interest in the property, that is the full beneficial interest, was in her prior to his death, and his death was not the origin of these rights. Cessation of managerial power over the property is not and cannot be made the occasion for the tax. Neither the Committee Reports nor the statute itself in terms or in operative effect, purport to tax the cessation of managerial control. Nor can the mere cessation of managerial control be made the occasion for an estate tax. Reinecke v. Northern Trust Co. 278 U. S. 339. It would be as improper to tax the husband at his death on his wife's property merely because managerial power ceases with his death, as it would be to tax a managing partner of a commercial partnership at death on the value of his partner's interest in his firm, or to tax a trustee at death on his beneficiary's property. See Poe v. Seaborn, supra. Moreover, control of community property is divided, to some extent, between the spouses. Arnold v. Leonard, supra.

The Court is of the opinion, therefore, that the statute in question violates the due process law clause of the Fifth Amendment, and that it is therefore unconstitutional and void.

26 The Court is also of the opinion that the statute violates the requirement of Article 1, Section 8, Clause 1, of the Constitution, providing that all excise taxes be uniform throughout the United States. "Uniformity" here means geographic not intrinsic uniformity. The requirement is that the same plan and

the same method be used throughout the United States, and the same subject be taxed throughout the United States at the same rate. Knowlton v. Moore, supra. The rule of liability must be the same in every state. Florida v. Mellon, 273 U. S. 12. The same method and plan is not by virtue of the amendment in question employed everywhere throughout the United States. Nor is the same subject taxed everywhere. The rule of liability varies from state to state.

The estate tax law is an excise on the privilege of passing property at death, with a few immaterial exceptions dealing with inter vivos transfers testamentary in character, which exceptions are themselves all geographically uniform. The estate tax is laid on transfers at death of property owned by the decedent. This is the rule of Sections 810 and 811 Int. Rev. Code. Knowlton v. Moore, supra. This is the rule applicable to all states, common law and community property alike. However, in the community property states an additional rule of liability is established, not recognized in the common law states. The 1942 Amendment, made specifically applicable to community property states alone, adds to a decedent's estate property not owned by decedent and not transferred at death. All property acquired my either spouse during marriage (except by gift, devise or inheritance), that is, all community property, is taxed by this statute to the first spouse to die, unless the executors show each item to have been derived originally from the personal earnings or the separate property of the survivor. It is only in the community property states that this rule is established. It is only in the community property states that property not owned and not transferred is taxed, and property acquired by either spouse during marriage is taxed in its entirety to the first spouse to die upon failure of the impossible burdens of proof hereinabove referred to. It is only in the community property states that significance is given to acquisition of property during marriage, and the questions of ownership at death and transfer at death are ignored. Thus, the same rule, the same methods and the same plans are not used everywhere throughout the United States, and the subject of taxation is not the same everywhere. It therefore follows that such Statute is discriminatory against the community property States such as Texas.

It is no answer to say that Congress may tax a subject wherever it may be found, though it not be found everywhere throughout the United States. Edye v. Robertson, 112 U. S. 580 (Head Money Cases). Community property is not a species of property such as tobacco. Community property merely refers to all property, real and personal, acquired by either spouse during marriage, except that acquired by gift, devise or descent. It is no different from other property so acquired in the common law states, except

that in certain circumstances the common law states would recognize the spouses as joint owners, and in other circumstances the one in whose name the property was taken would be regarded as the owner or as trustee for the half interest of the other spouse. (See Depas v. Mayo, 11 Mo. 314, and Solicitor's Opinion 121.) In the community property states all such property would be regarded as jointly owned, no matter in whose name the property stands.

The acquisition of property acquired during marriage by either spouse, is an event occurring in all states. It is this acquisition and not community property as such that is made the subject of tax in the community property states and not in the common law states. The statute does not purport to tax community property as such. Had it done so it would have been a direct tax, void because unapportioned. The tax is laid with respect to acquisition of property during marriage, with the exceptions noted above, but this subject, though occurring in other states, is not selected as the subject of the tax in those states.

A different rule of taxation is thus prescribed with respect to the same persons and the same property merely because of the state in which they lived at the time of death. We have thus an amazing situation. Congress continues to recognize, for estate tax purposes, the law of the common law states. The law of these common law states in turn recognizes (in common law terminology) the laws of Texas. Yet when dealing directly with Texas citizens and the same property, Congress disregards the State property laws, which in the Tyler case, supra, the United
27 States Supreme Court says it is bound to follow.

Had Congress provided that all property acquired by spouses during marriage throughout the United States, except property derived from the salaries or separate property of the survivor, be taxed to the first to die, and had Congress made this rule applicable in all states alike, disregarding state rules of ownership and transfer at death, no quarrel could be raised as to uniformity. But inasmuch as Congress has specifically made these rules applicable to certain states only, it is clear that the statute lacks uniformity.

The Court is of the opinion, therefore, that the statute violates the uniformity provision, and that for this additional reason it must be held unconstitutional.

Counsel for the Government presses upon the Court United States v. Jacobs, 306 U. S. 363, and Tyler v. U. S. 281 U. S. 497, arguing that joint tenancies and tenancies by the entirety are similar to community property estates. In joint tenancies and tenancies by the entirety, there is unity of title and interest, and by reason of the doctrine of survivorship, death enlarges the sur-

vivor's property rights. They have been held to be testamentary in character. The tax is laid upon the demise of the one that contributed the property. They were in those cases voluntary contractual situations entered into for tax avoidance. To all intents and purposes they were gifts in contemplation of death. As said by the Supreme Court of Louisiana in Succession of Wiener, supra:

"Thus it may be seen that the pivotal points upon which the decisions in these two cases turned were that the wife contributed nothing, either in money or property, toward the creation of the joint tenancy or the tenancy by the entirety, and that she was powerless to dispose of any interest in such estate by will or through legal heirship."

The opinion of the Trial Court in the case of Dimock v. Corwin, reported in 19 Fed. Supp. 56 (which was one of the two cases disposed of by the Supreme Court's opinion in the case of United States v. Jacobs, supra), states:

"The joint estate was created in 1916 as has been said. a few months prior to the adoption of the estate tax. The chances are that the purpose of Mr. and Mrs. Folger was not entirely unrelated to the possible enactment of such legislation."

This was said in support of the ruling that the whole of the joint tenancy, created before the Estate Tax was enacted, was to be included in the gross estate of the decedent instead of merely a one-half interest which might have been partitioned, severed, or sold by the decedent during his lifetime had he seen fit to defeat the wife's right to take under the doctrine of survivorship. In this connection, the Court further said:

"Had there been a severance in this case, it may be assumed that a tenancy in common would have been brought about, and the present issue would not have arisen."

The Circuit Court of Appeals in affirming the judgment of the Trial Court (99 Fed. (2d) 799), said:

"Congress has placed this tax on all joint estates because they accomplish the result of transferring the decedent's property to the surviving spouse. But Congress has excluded any portion of the property which does not represent such a transfer. * * * Congress has provided that all such transactions be included without causing an inquiry in each case, whether the particular gift was designedly made to evade the tax."

There was no opinion by the Trial Court in the companion case determined by the Supreme Court in United States v. Jacobs,

supra, but the opinion of the Circuit Court of Appeals is reported in 97 Fed. (2d) 784 (Jacobs v. United States). That Court affirmed the judgment of the Trial Court, holding that only one-half of a joint tenancy created prior to the enactment of the Federal Estate Tax was to be included in the gross estate of the decedent. The Circuit Court rested its opinion upon the distinctions between a joint tenancy and a tenancy by the entirety, pointing out that a joint tenant has a right to sell his interest and may sue for partition. The Circuit Court cited the case of Knox v. McElligott, 258 U. S. 546, and quoted from that opinion as follows:

28

"From the structure of the act to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

It is true that the opinion of the Circuit Court just referred to was reversed by the Supreme Court in United States v. Jacobs, supra. However, the Supreme Court found that the distinctions between a joint tenancy and a tenancy by the entirety were not sufficient to prevent the inclusion of the whole estate, saying:

"The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions. * * *

"In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for the purposes of taxation. * * * Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. * * *

"While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had no right to dispose of her interest by will, nor could it pass to her legal heirs. She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her cotenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains."

The fundamental basis of the decision in the case of Tyler vs. United States, supra, is thus stated in the opinion of the Court. "* * * To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy,

mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death was relieved from restrictions imposed by the law in respect to tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. Taft v. Bowers, 278 U. S. 470, 482."

The Statutes involved in those cases did not purport to require the inclusion in the gross estate of whichever spouse died first, as does the Statute here involved, but merely made this requirement as to the estate of the donor of the property involved just as is done in the case of ordinary gifts made in contemplation of death.

Such situations are not analogous to the case of the community property as known to the State of Texas. Community property cannot be partitioned during the marriage, and the wife
29 or husband could not sever the joint estate and thus escape the application of the Estate Tax, except by severing the marital relation. McDonald v. Stevenson, 245 S. W. 777; Kellett v. Trice, 95 Texas, 160. On the other hand, either spouse can dispose of his or her respective interest by will and in the absence thereof each spouse's share passes to the descendants, if any, instead of to the survivor. There is no right of either spouse to take the other's half under the doctrine of survivorship, but only by will, or by inheritance if there are no descendants. Moreover, the community interests of the spouses vest upon acquisition as in the case of tenants in common, and do not arise from the gift or voluntary action of either spouse, while the converse was true of the joint estates involved in the Jacobs and Tyler cases. The community relationship constitutes a partnership in which the husband is primarily the managing partner, although not always because the wife has management of a portion of the community property; and management may by legislative action be taken away or conferred upon the other spouse without running contrary to the constitutional community property rights guaranteed by the State Constitution and and its laws, and entitled to protection under the Federal Constitution.

In view of the foregoing, the Court deems it unnecessary to pass on the remaining questions raised by the plaintiff, to wit, that the statute in question is a direct tax void because unappor-

tioned and also that it invades the powers reserved to the states, in violation of the Tenth Amendment.

Judgment is accordingly rendered on this 2nd day of March, 1945, that plaintiff recover of defendant the sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76), together with interest thereon from date of this judgment at the rate of 4% per annum.

ALLEN B. HANNAY,
Judge Presiding.

Filed March 2, 1945.

30 In United States District Court

[Title omitted.]

Motion to amend findings of fact and conclusions of law and to correct amount of judgment

Filed March 9, 1945

The United States by its attorney, W. R. Smith, Jr., United States Attorney for the Western District of Texas, San Antonio Division, pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure, moves the Court to amend its findings or conclusions by eliminating therefrom the italicized portion of the following findings of conclusions (pp. 3–4, 10–11):

"He (referring to decedent), a stock farmer, and his farmer wife, living together on a small ranch acquired after marriage largely on credit gradually acquired a comparatively substantial estate which, *as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife.* * * *

* * * * *

"It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate. * * *"

The grounds of the motion are that:

1. There is no evidence in the record to support the finding or holding that any part of the community property here
31 involved is attributable to the work or efforts of decedent's wife.

2. The source or origin of the community property in this case cannot be found or determined in the absence of evidence relative thereto.

3. The activities of decedent's wife, relative to the community property, is not a matter of judicial notice.

4. The origin or source of the community property here involved is a matter of proof, not "a matter of common knowledge." There is no allegation in the complaint that decedent's wife worked on the ranch or that she produced any portion of the community property. The stipulation is silent with regard thereto and there is nothing in the stipulation from which it can be inferred that decedent's wife earned or by her work or efforts actually produced any of the community property. No evidence was introduced at the trial. The case was by agreement between the parties submitted on the pleadings and the stipulation. Moreover, plaintiff made no request, insofar as known to the United States, for a finding or holding that the wife produced any of the community property.

5. The statements which the United States moves be stricken have the aspect of findings of fact since they specifically pertain to the property here in question. If, however, the statements were intended as conclusions of law, they should, nevertheless, be stricken for the reason that they could only be based on the evidence in this case and have no support in the evidence.

The United States further moves, pursuant to Rule 60 of the Federal Rules of Civil Procedure, that the judgment in the principal amount of $6,937.76 be reduced by the amount of
32 $36.65 for the reason that in view of the holding of the Court that one-half of the community property should be excluded from the taxable estate deductions for executor's commissions, attorneys' fees, and administrative expenses should be correspondingly reduced. Such commissions, fees, and expenses are under Texas law borne by the entire community estate.

W. R. Smith, Jr.,
United States Attorney.

[File endorsement omitted.]

33 In United States District Court

[Title omitted.]

Order denying defendant's motion to amend findings of fact and conclusions of law, and correcting amount of judgment

Filed March 13, 1945

On this 12th day of March 1945, came on to be considered by the Court the Defendant's Motion to Amend Findings of Fact and Conclusion of Law, and to Correct amount of Judgment, which said motion was filed herein on March 9, 1945, and same is in all

things denied except as to the correction of the amount of the judgment as to which the plaintiff concurs.

It is, therefore, ordered that the principal amount of the judgment heretofore entered herein be reduced by the sum of Thirty-Six and 65/100 Dollars, making the principal amount of the judgment Six Thousand Nine Hundred and One and 11/100 Dollars ($6,901.11), and in all other respects said judgment is continued in full force and effect as of March 2, 1945.

ALLEN B. HANNAY,
Judge Presiding.

[File endorsement omitted.]

34 In United States District Court

[Title omitted.]

Petition for appeal

Filed March 30, 1945

To the District Court of the United States, Western District of Texas, San Antonio Division:

The United States does hereby appeal from the judgment made and entered in this cause on March 2, 1945, to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and petitions that this appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings, and papers upon which said judgment is based, duly authenticated, may be transmitted to the Supreme Court of the United States at Washington, D. C. A statement of jurisdiction is presented herewith.

Dated at San Antonio, Texas, this 30th day of March 1945.

W. R. SMITH, Jr.
United States Attorney,
Western District of Texas, San Antonio Division

[File endorsement omitted.]

35 In United States District Court

[Title omitted.]

Assignment of errors

Filed March 30, 1945

The United States assigns the following errors:

1. The Court erred in granting judgment for plaintiff.

2. The Court erred in failing to hold valid and constitutional the provisions of Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, requiring the inclusion in the taxable estate of Ernst Herbst, deceased, of the entire value of the community property held by decedent and his surviving spouse.

3. The Court erred in holding that the provisions of Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, violated the due process clause of the Fifth Amendment to the Constitution.

4. The Court erred in holding that Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, violated the uniformity requirement of Article I, Section 8 of the Constitution.

36 5. The Court erred in finding or concluding that the community property in question was acquired through the joint work of both decedent and his wife.

W. R. SMITH, JR.,
United States Attorney,
Western District of Texas, San Antonio Division.

[File endorsement omitted.]

41 In United States District Court

[Title omitted.]

Order allowing appeal

Filed March 31, 1945.

Petition and motion of the United States for appeal from the final judgment and order of this Court is hereby granted and the said appeal is hereby allowed.

It is further ordered that a certified transcript of the record, proceedings, and papers be transmitted to the Supreme Court of the United States at Washington, D. C.

Dated at Corpus Christi, Texas, this 31st day of March 1945.

ALLEN B. HANNAY,
United States District Judge.

[File endorsement omitted.]

45 In United States District Court

[Title Omitted]

Praecipe for transcript of record

Filed March 31, 1945

To the Clerk, United States District Court, Western District of Texas, San Antonio Division:

The appellant hereby requests that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries.
2. Complaint.
3. Answer.
4. Stipulation.
5. Opinion of this Court.
6. Judgment.
7. Motion of the United States to amend findings.
8. Order denying motion to amend findings.
9. Petition for appeal, showing the date of filing thereof.
10. Assignment of errors.
11. Order allowing appeal.
12. Jurisdictional statement.
13. Praecipe for transcript of record.

46 14. Proof of service on appellee of petition for appeal, order allowing appeal, assignment of errors, statement as to jurisdiction, and statement to appellee directing her attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

15. Statement to appellee directing her attention to the provisions of Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

Filed at San Antonio, Texas, this 31st day of March 1945.

W. R. SMITH, JR.,
United States Attorney,
Western District of Texas, San Antonio Division.

[File endorsement omitted.]

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 In United States District Court

[Title omitted.]

Stipulation for enlargement of record on appeal

Filed April 14, 1945

It is hereby stipulated and agreed by and between the attorney for the defendant-appellant and the attorney for the plaintiff-appellee in the above-entitled cause that the waiver of citation and the waiver of right to file statement in opposition to jurisdiction which have hitherto been filed and this stipulation shall be certified and transmitted to the Supreme Court of the United States as a part of the record on the appeal in this case.

Dated this 13th day of April 1945.

W. R. SMITH, JR.
Attorney for Defendant-Appellant.
HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Plaintiff Appellee.

[File endorsement omitted.]

49 In United States District Court

[Title omitted.]

Waiver of citation

Filed April 14, 1945

The United States of America, having filed its Assignment of Errors and Petition for Appeal, and Statement of Jurisdiction, and having been allowed an appeal to the United States Supreme Court in the above-entitled cause, and plaintiff-appellee, having been served with copies of the Assignment of Errors, Petition for Appeal, Order allowing appeal, Statement of Jurisdiction, and Statement directing attention to the provisions of Paragraph 3, Rule 12 of the Revised Rules of the Supreme Court of the United States, plaintiff-appellee does, by his attorneys, hereby waive the issuance and service of a citation herein and does enter his appearance in the Supreme Court of the United States.

Dated this 13th day of April 1945.

HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Plaintiff-Appellee.

[File endorsement omitted.]

50 In United States District Court

[Title omitted.]

Waiver of right to file statement in opposition to jurisdiction

Filed April 14, 1945

An appeal to the Supreme Court of the United States, having been allowed to the United States of America in the above-entitled cause, and the United States, having served on plaintiff and appellee a copy of the petition for appeal and order allowing appeal, together with a copy of the Assignment of Errors and Statement as to Jurisdiction and a Statement directing attention to the provisions of Paragraph 3, Rule 12 of the Revised Rules of the Supreme Court of the United States, plaintiff and appellee, by his attorneys, does hereby waive the right to file a Statement opposing jurisdiction.

Dated this 13th day of April 1945.

HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Plaintiff-Appellee.

[File endorsement omitted.]

51 [Clerk's certificate to foregoing papers omitted in printing.]

52 In the Supreme Court of the United States

Statement of points relied upon, and designation of entire record for printing

Filed April 20, 1945

Pursuant to Rule 13, paragraph 9, of the Revised Rules of this Court, appellant states that it intends to rely upon all of the points in its assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

Service acknowledged this 16th day of April 1945, and appellee hereby consents to the designation of record made above by appellant.

HARRY C. WEEKS,
PALMER HUTCHESON,
J. P. JACKSON,
R. N. GRESHAM,
Attorneys for Appellee.

[File endorsement omitted.]

53 Supreme Court of the United States

Order noting probable jurisdiction

May 7, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsement on cover:] Enter the Attorney General. File No. 49612. Western Texas, D. C. U. S. Term No. 1159. The United States of America, Appellant vs. Henry Rompel, Jr., Administrator de bonis non cum testamento annexo of Enrst Herbst, Deceased. Filed April 13, 1945. Term No. 1159 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945

FILE COPY

APR 13 1945
CHARLES ELMORE CROPLEY
CLERK

No. 1159

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

n the District Court of the United States for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, PLAINTIFF AND APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT AND APPELLANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, amended March 25, 1940, October 21, 1940, May 26, 1940, April 6, 1942, the appellant submits herewith its statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment here complained of is conferred by Section 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751.

B. The statute of the United States, the validity of which is involved herein, is Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942, c.

619, 56 Stat. 798. Section 811 (e) prior to the amendment and the amendment in question are as follows:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

(e) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided*

further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

* * * * *

(26 U. S. C. 1940 ed., Sec. 811)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 402. COMMUNITY INTERESTS.

* * * * *

(b) *General Rule.*—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) *Joint Interests.*—" and inserting in lieu thereof

"(e) *Joint and Community Interests.*—

"(1) *Joint Interests.*—"

(2) By inserting at the end thereof the following new paragraph:

"(2) *Community Interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal

services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

* * * * *

(26 U. S. C. 1940 ed., Supp III, Sec. 811)

C. The judgment of the District Court sought to be reviewed was entered on the 2nd day of March 1945. The petition for appeal was filed on the 30th day of March, 1945, and was presented to the District Court herewith, to wit, on the 31st day of March 1945.

This suit was brought to recover federal estate taxes, together with interest, paid by plaintiff on behalf of the estate of Ernst Herbst, deceased, who died November 17, 1943. A timely claim for refund was filed and upon its rejection suit seasonably brought in the District Court. The sole question involved is whether all or only one-half of the community property held by decedent and his surviving spouse should be included in the gross estate for estate tax purposes. It was stipulated that no part of the property taxed was received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

The entire value of the community property here involved is includible in decedent's taxable estate under the provisions of Section 811 (e) of the Internal Revenue Code, as amended by Section 402 (b) of the Revenue Act of 1942. The District Court held the relevant statute unconstitutional.

The District Court decided that the statute violated the due process clause of the Fifth Amendment to the Constitution because (1) the statute taxed in decedent's estate the property of his surviving spouse; (2) the property taxed in decedent's estate was property which he never owned and which he could not and did not transfer at his death; (3) the statute imposes burdens of proof in tracing the community funds actually produced by the surviving spouse impossible of being met; (4) the statute is applied retroactively since its taxes past transactions unrelated to the decedent's death; and (5) the decedent's death did not result in an enlargement of the wife's property rights in her one-half of the community property. The District Court also held that the tax applied only to community property states and thus lacked geographic uniformity in violation of Article I, Section 8 of the Constitution.

There are eight states in which the community property system is in force and the amendment to Section 811 (e) of the Internal Revenue Code, made by Section 402 (b) of the Revenue Act of 1942, will affect the tax liability of a large num-

ber of decedents' estates. The matter of having the issue of the constitutionality of this provision determined is consequently of great importance in the administration of the taxing statutes.

It is believed that the following decisions sustain the Court's jurisdiction: *O'Malley* v. *Woodrough*, 307 U. S. 277; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *United States* v. *Johnson*, 319 U. S. 302; and *Bowles* v. *Willingham*, 321 U. S. 503.

A copy of the District Court's opinion in this case is attached.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.
W. R. SMITH, Jr.,
United States Attorney.

Filed March 30, 1945, Maxey Hart, Clerk.

In the District Court of the United States for the Western District of Texas, San Antonio Division

Civil Action No. 621

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

R. N. Gresham, San Antonio, Texas; Palmer Hutcheson, Houston, Texas; J. P. Jackson,

Dallas Texas, and Harry C. Weeks, Fort Worth, Texas, for the Plaintiffs.

Samuel O. Clark, Jr., Asst. Attorney General; Andrew D. Sharpe, Helen R. Carloss, and James P. Garland, Special Assistants to the Attorney General, and W. R. Smith, Jr., United States Attorney, for the Defendant.

FINDINGS, CONCLUSIONS, JUDGMENT AND OPINION

This suit was brought under the Tucker Act
8 (Sections 761–5, Title 28, U. S. C. A.) to recover an estate tax assessed against and collected under protest from the plaintiff with respect to the estate of Ernest Herbst, a Texas citizen, who died November 17, 1943. This tax resulted from the defendant's inclusion in the decedent's gross estate of all of the community property which belonged to the decedent and his wife, and which had been accumulated by them in Texas, at the date of decedent's death, rather than one-half thereof. This, the parties admit, is required by the provisions of Section 402 (b) of the Revenue Act of 1942. Plaintiff timely filed claim for refund, which was rejected, and relies for recovery upon his properly pleaded contention that this Section violates various provisions of the Constitution of the United States. The defendant asserts the Section is valid. If the Section is unconstitutional, the plaintiff is entitled to recover all of the tax paid, for the

decedent's separate estate plus one-half of the community estate (less deductions not in controversy) amounts to less than the statutory exemption of Sixty Thousand Dollars ($60,000.00) prescribed by the 1942 Act (Section 935 (c) I. R. C. as amended). If the Section is not unconstitutional and void, plaintiff admits that he is entitled to recover nothing.

No evidence having been introduced, the Court finds as the facts the allegations of fact contained in the complaint, to the extent they were admitted by defendant's answer, and the additional facts contained in the written stipulation filed herein by the parties. These are incorporated here by reference.

The Court concludes:

1. Section 402 (b) of the Revenue Act of 1942 is unconstitutional and void, being in conflict with the requirements as to due process contained in the Fifth Amendment to the Constitution of the United States, as well as with the requirement of uniformity for an excise tax contained in Article 1, Section 8, Clause 1, of the said Constitution.

2. Plaintiff is entitled to recover from defendant the aforesaid sum of Six Thousand Nine Hundred Thirty-Seven and 76/100 Dollars ($6,937.76) heretofore collected from plaintiff, with interest from the date of judgment, as provided by law.

The constitutional questions presented by plaintiff must be decided, for there is no way to construe Section 402 (b) of the Revenue Act of 1942 so as to avoid necessity for such a decision. The responsibility thus imposed upon the Court is fully appreciated, and were it possible to decide the rights of the parties by a construction which would avoid the constitutional problems the Court would do so.

The factual situation presented by this record is a typical one—one which, with minor and unimportant variations, exists as to many husbands and wives in Texas. Herbst and wife had no property at the time of their marriage in 1901. Until 1937 neither acquired any property by gift, devise or descent. Neither ever received compensation for personal services rendered to anyone. He, a stock farmer, and his farmer wife, living together on a small ranch acquired after marriage largely on credit, gradually acquired a comparatively substantial estate which, as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife. The separate property acquired by the decedent in 1937 and which was on hand intact at his death, did not contribute materially to the accumulations, and need not enter into the consideration of the problem involved.

Before passing on the constitutional questions raised, it is necessary to examine the rights and

title of the decedent and his surviving wife in the community property owned by them at the time of his death.

The community law of Texas stems from the civil law, and it has been the law of Texas as far back as any historical record exists. It was the law of the Spanish Empire when Texas was a part thereof. It was the law of the Republic of Mexico when Texas was part of Mexico. It was the law of the Republic of Texas when Texas was a Republic. And it was the law of Texas when Texas was admitted to the Union in 1845. Prior to, and as a condition of Texas becoming a part of the Union, Congress by joint resolution provided that Texas was to adopt a Constitution acceptable to the Congress, and pursuant thereto the Constitution of 1845 was adopted, preserving therein the community property system as then recognized in Texas. It has remained the fundamental law of Texas, without the change of a single word in the Texas Constitution, from that date. It is important to note that this occurred many, many years before any Federal Estate Tax legislation was ever had. Thus Texas community property law is embedded in and forms a part of the State policy of Texas. *Hopkins* v. *Bacon*, 282 U. S. 122. And this State law establishes a rule of property which the Federal Court is bound to follow. *Warburton* v. *White*, 176 U. S. 484, *496*; *Tyler* v.

United States, 281 U. S. 497, *501.* It is neither a contractual nor consensual system, but an ancient body of law forming an important and integral part of the fundamental law of Texas, and results, not from voluntary agreements of the parties, but by operation of law, as a vital incident of the marriage relation. (Compare Commissioner v. Harmon, 323 U. S. ——).

Under this community system, the wife is an equal owner with her husband in all of the community property. Their rights, title and interest are co-equal and of equal dignity. The wife does not take her title through or under the husband. Her interest is an absolute, vested property right. The husband never owned any interest in her portion of the property, inasmuch as she acquired it by onerous title at the very moment of its acquisition and continued uninterruptedly to hold such title as long as the property remained an asset of the community. The husband owns no interest in the wife's portion of the property which terminates with his death. He cannot, and in the instant case he did not undertake to, dispose of her interest by will. On his death, his one-half interest in the property passed to his legatees and devisees. The wife simply retained an equal interest in the property which she owned as co-owner prior to her husband's death.

The wife enjoys full power of testamentary disposition of her one-half interest in the prop-

erty, having the unqualified right to will it to whom she chooses. At her death without a will her interest passes to her heirs at law.

The relationship of the spouses in Texas during their lifetime is substantially that of partners in a commercial partnership, and the husband and wife are in all respects equal partners, the husband being the managing partner and vested with management powers. The husband, as managing partner, stands in a fiduciary relation to his wife, and must act in good faith in the handling of her interest in the property, and should he defraud or attempt to defraud his wife's interest, she may have redress against him or against her property in the hands of a third party. He must account to her strictly if his power of management is used to impair her community interest. Bad faith is not the criterion. He is the trustee, and is accountable as such. *Arnold* v. *Leonard,* 114 Texas 535, 273 S. W. 799.

In the case of divorce she has the right to her one-half, and if no property settlement is made on divorce the parties each continue to hold one-half thereof as tenants in common.

Should her husband, the managing partner, become insane, imprisoned or, otherwise incapacitated, or should he abandon her, she may succeed to the management of the community estate. At his death she, as surviving partner, is charged with winding up the affairs of the connubial partnership.

The wife is liable for income taxes on the property which represents her one-half interest of the partnership income. At her death her legatees and heirs are liable for Texas inheritance taxes on her one-half of the community property, just as the husband is on his half only. *Jones* v. *State,* 5 S. W. (2d) 973. At her death, her estate must pay federal estate taxes upon her one-half interest, even under the terms of the Act in question, just as she and her husband have been paying on their respective half interests only, with full approval prior to the 1942 Act. *T. D. 2450* and *3670.*

It is clear from the foregoing summary that in Texas the wife is a full equal co-owner with her husband of the community partnership assets. The Supreme Court of Texas has repeatedly so held. *Wright* v. *Hays,* 10 Tex. 130; *Burnham* v. *Hardy Oil Co.* 108 Tex. 555; *Patty* v. *Middleton,* 82 Tex. 586; *Wheat* v. *Owens,* 15 Tex. 242; *Wood* v. *Wheeler,* 7 Tex. 13; *Arnold* v. *Leonard,* supra; *Jones* v. *State,* supra; *Blackmon* v. *Hansen,* 169 S. W. (2d) 962. The Supreme Court of the United States has likewise repeatedly recognized that the rights of the two spouses are equal, under community property law. *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; *Poe* v. *Seaborn,* 282 U. S. 101; *Hopkins* v. *Bacon,* 282 U. S. 122. As the Supreme Court stated in *Hopkins* v. *Bacon,* supra, at pp. 125

and 126, involving community income of spouses domiciled in Texas, the wife "has a proprietary vested interest in the community property such as makes her an owner of one-half of the community income. * * * The interest of a wife in community property in Texas is properly characterized as a present vested interest, equal or equivalent to that of her husband."

When Section 402 (b) (2) of the Revenue Act of 1942 is examined against the background of the foregoing summary of the Texas law, it becomes apparent that the statute in controversy violates the due process clause of the Fifth Amendment. That Section provides that all community property (the survivor's half as well as the decedent's half) shall be included in the decedent's estate, with two exceptions:

(a) Community property derived originally from compensation for personal services of the surviving spouse; and

(b) Community property derived originally from separate property of the survivor.

Community property acquired during marriage may be derived from a variety of sources not within either of the above exceptions. For example, property acquired with borrowed money, as in this case; property acquired with commingled funds; property acquired from gainful occupations, where neither spouse received compensation for personal services actually ren-

dered, and where one of the spouses is engaged in his or her own independent business, or where both are so engaged, such as farming, merchandising, ranching, manufacturing, or any other independent business; property acquired from earnings of minor children; property acquired as damages for tort; property acquired through speculation; property acquired by adverse possession; property acquired from other sources than salaries or wages.

It is stipulated in this case that the ranch, which was the principal source of the community accumulation, was acquired largely on credit. It is further stipulated that neither party derived compensation for personal services. It is likewise clear from the stipulation and agreed facts that, except to a negligible extent, none of the community resulted from the separate property of either spouse. It follows, therefore, from the agreed facts that the community property in question would not fall within either exception of the statute, and it is therefore that type of community property that is taxed under the statute to the full extent as a part of the estate of the spouse who died first.

This statute clearly violates due process, first, because it taxes this decedent's estate with his wife's property. The Supreme Court has repeatedly held that a tax on A measured by B's property is void because violative of due process.

Hoeper v. *Wisconsin*, 284 U. S. 206; *Knowlton* v. *Moore*, 178 U. S. 41; *Heiner* v. *Donnan*, 285 U. S. 312; *Frew* v. *Bowers*, 12 Fed. (2d) 625; *Hartman* v. *Greenhow*, 102 U. S. 672; *Nichols* v. *Coolidge*, 274 U. S. 531; *Coolidge* v. *Long*, 282 U. S. 582; *Schlesinger* v. *Wisconsin*, 270 U. S. 230. See also *Succession of Weiner*, 203 La. 649, 14 So. (2d) 475, where it is said:

> "And yet, we are asked to place an interpretation on Act No. 119 of 1932 and section 402 (b) (2) of the Revenue Act of 1942 that would result in the inclusion in the estate of the managing partner of an interest in the community partnership to which he never had any claim and which was, in fact, during his lifetime and is now, owned by his wife."

Again, this statute is more arbitrary and capricious in other respects. It is not only taxes or attempts to tax the decedent for property which he did not own, but it also taxes property which he never owned and which he could not and did not transfer at his death. And the surviving wife is again taxed on her half of the property when she dies, with the result that the identical property is taxed to each of the two spouses, once to the spouse who owned, and once to the spouse who did not. This is double taxation. Moreover, each is reciprocally taxed on the other's property. Such, results in not only "taxation but spoilation". Had Mrs. Herbst predeceased her hus-

band, the statute would have required the inclusion of all of the community property here involved in her estate. The sheer accident of his prior death, and not any title or interest of Mr. Herbst in his wife's portion of the community property, has resulted in the present effort to tax the same as a part of his estate. However, had the wife predeceased the husband, she would have been deemed the owner and been taxed on the full amount thereof. Such a statute is clearly arbitrary and capricious and confiscatory and violates due process.

Moreover, the statute requires an investigation of all transactions over a long married life in order to determine whether each item of property on hand at the time of death was derived originally from the separate property or the earnings of the survivor.

If the exception of "compensation for personal services" as used in Section 402 (b) is to be given its ordinary meaning, that is, receipts for personal services rendered to someone else, or "earned income" (*McLarry* v. *Commissioner*, 30 Fed. (2d) 789; *Graham* v. *Commissioner*, 95 Fed. (2d) 174), then, under the facts in this case, there is no problem in tracing the origin of the community property here involved, for it is stipulated that neither spouse at any time during marriage received salaries, fees or similar compensation; but if, as the Government's counsel suggests, the term

is to be broadened to include the gain from any business activity embracing personal efforts, then there would be in this case a problem of tracing which could not be solved. The parties here were married for 40 years. It would be a physical impossibility for the executors in this case, or any case such as this, after the death of the one most familiar with the business transactions, to trace every item of property on hand at death back through every transaction, and back through the various mutations and changes for 40 years, to determine its origin. Never before have spouses found it necessary to maintain detailed records of their respective contributions to their joint estate. And even if records had been kept, they would not have enabled the executors to meet the burden imposed upon them by this law. It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate. Their respective services, no matter how detailed their records may be, are impossible separately to evaluate. Thus the statute imposes burdens of proof impossible of being met.

Moreover, under this law, the property in this case is presumed to be owned entirely by the husband merely because he died first. At the same time, had the wife died first, the statute would have presumed the same property to be

owned entirely by the wife. The statute thus creates arbitrary and capricious presumptions contrary to law, to fact, and to human and economic experience. There is no reasonable connection between the fact proved and the fact presumed. These arbitrary presumptions and these impossible burdens of proof clearly violate the Fifth Amendment. *Mobile J. & K. C. R. Co,* vs. *Turnipseed,* 219 U. S. 35; *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79; *Tot* v. *U. S.,* 87 L. Ed. 1519; *Manley* v. *Georgia,* 279 U. S. 1; *Bailey* v. *Alabama,* 219 U. S. 219; *Heiner* v. *Donnan,* supra; *Schlesinger* v. *Wisconsin,* supra.

Furthermore, the statute, in the Court's opinion, violates due process in that it ascribes significance to the origin of wealth, and thus in effect taxes decedent at death with respect to transactions occurring many years previously, innocent in nature, and not testamentary in character. The statute looks to the acquisition of the community property, and attempts to make the tax fall, in the language of the Committee Report, on the one to whom the property is "economically attributable". It is therefore a retroactive statute, taxing past transactions unrelated to death, and is therefore more capricious and pernicious than other retroactive statutes condemned by the Supreme Court. *Untermeyer* v. *Anderson,* 276 U. S. 440; *Nichols* v. *Coolidge,* supra; *Coolidge* v. *Long,*

supra. See also *In Re Pell*, 171 N. Y. 48, 63 N. E. 789; *In Re Clark's Estate*, 74 Pac. (2d) 401.

Under the foregoing cases, property rights previously vested in another may not be included in the decedent's estate for estate tax purposes, even though the property rights involved had been created by the decedent in the lifetime, donatively and under circumstances where he retained some interest in the property. A fortiori, Congress may not in this case include by a retroactive statute the interest of the wife in community property, where such interest was fully vested many years prior to her husband's death, and where her rights were not donatively created by the husband, but arose by operation of law as an incident of the marriage, many years prior to the first estate tax law, and where the husband never had any beneficial interest therein.

It is argued that at the husband's death there is a shift of property interests in that at his death the wife would have the management. Death of the husband did of course terminate his managerial control over the community property. However, his death would not result in an enlargement of the wife's property rights. Her interest in the property, that is the full beneficial interest, was in her prior to his death, and his death was not the origin of these rights. Cessation of managerial power over the property is not and cannot be made the occasion for the tax.

Neither the Committee Reports nor the statute itself in terms or in operative effect, purport to tax the cessation of managerial control. Nor can the mere cessation of managerial control be made the occasion for an estate tax. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. It would be as improper to tax the husband at his death on his wife's property merely because managerial power ceases with his death, as it would be to tax a managing partner of a commercial partnership at death on the value of his partner's interest in his firm, or to tax a trustee at death on his beneficiary's property. See *Poe* v. *Seaborn*, supra. Moreover, control of community property is divided, to some extent, between the spouses. *Arnold* v. *Leonard*, supra.

The Court is of the opinion, therefore, that the statute in question violates the due process law clause of the Fifth Amendment, and that it is therefore unconstitutional and void.

The Court is also of the opinion that the statute violates the requirement of Article 1, Section 8, Clause 1, of the Constitution, providing that all excise taxes be uniform throughout the United States. "Uniformity" here means geographic not intrinsic uniformity. The requirement is that the same plan and the same method be used throughout the United States, and the same subject be taxed throughout the United States at the same rate. *Knowlton* v. *Moore*, supra. The rule of

liability must be the same in every state. *Florida* v. *Mellon,* 273 U. S. 12. The same method and plan is not by virtue of the amendment in question employed everywhere throughout the United States. Nor is the same subject taxed everywhere. The rule of liability varies from state to state.

The estate tax law is an excise on the privilege of passing property at death, with a few immaterial exceptions dealing with inter vivos transfers testamentary in character, which exceptions are themselves all geographically uniform. The estate tax is laid on transfers at death of property owned by the decedent. This is the rule of *Sections 810 and 811 Int. Rev. Code. Knowlton* v. *Moore,* supra. This is the rule applicable to all states, common law and community property alike. However, in the community property states an additional rule of liability is established, not recognized in the common law states. The 1942 Amendment, made specifically applicable to community property states alone, adds to a decedent's estate property not owned by decedent and not transferred at death. All property acquired by either spouse during marriage (except by gift, devise, or inheritance), that is, all community property, is taxed by this statute to the first spouse to die, unless the executors show each item to have been derived originally from the personal earnings or the separate property of the survivor. It is only

in the community property states that this rule is established. It is only in the community property states that property not owned and not transferred is taxed, and property acquired by either spouse during marriage is taxed in its entirety to the first spouse to die upon failure of the impossible burdens of proof hereinabove referred to. It is only in the community property states that significance is given to acquisition of property during marriage, and the questions of ownership at death and transfer at death are ignored. Thus, the same rule, the same methods and the same plans are not used everywhere throughout the United States, and the subject of taxation is not the same everywhere. It therefore follows that such Statute is discriminatory against the community property States such as Texas.

It is no answer to say that Congress may tax a subject wherever it may be found, though it not be found everywhere throughout the United States. *Edye* v. *Robertson,* 112 U. S. 580 (Head Money Cases). Community property is not a species of property such as tobacco. Community property merely refers to all property, real and personal, acquired by either spouse during marriage, except that acquired by gift, devise or descent. It is no different from other property so acquired in the common law states, except that in certain circumstances the common law states would recognize the spouses as joint owners, and

in other circumstances the one in whose name the property was taken would be regarded as the owner or as trustee for the half interest of the other spouse. (See *Depas* v. *Mayo,* 11 Mo. 314, and *Solicitor's* Opinion 121.) In the community property states all such property would be regarded as jointly owned, no matter in whose name the property stands.

The acquisition of property acquired during marriage by either spouse, is an event occurring in all states. It is this acquisition and not community property as such that is made the subject of tax in the community property states and not in the common law states. The statute does not purport to tax community property as such. Had it done so it would have been a direct tax, void because unapportioned. The tax is laid with respect to acquistion of property during marriage, with the exceptions noted above, but this subject, though occurring in other states, is not selected as the subject of the tax in those states.

A different rule of taxation is thus prescribed with respect to the same persons and the same property merely because of the state in which they lived at the time of death. We have thus an amazing situation. Congress continues to recognize, for estate tax purposes, the law of the common law states. The law of these common law states in turn recognizes (in common law terminology) the laws of Texas. Yet when dealing

directly with Texas citizens and the same property, Congress disregards the State property laws, which in the *Tylor* case, supra, the United States Supreme Court says it is bound to follow.

Had Congress provided that all property acquired by spouses during marriage throughout the United States, except property derived from the salaries or separate property of the survivor, be taxed to the first to die, and had Congress made this rule applicable in all states alike, disregarding state rules of ownership and transfer at death, no quarrel could be raised as to uniformity. But inasmuch as Congress has specifically made these rules applicable to certain states only, it is clear that the statute lacks uniformity.

The Court is of the opinion, therefore, that the statute violates the uniformity provision, and that for this additional reason it must be held unconstitutional.

Counsel for the Government presses upon the Court *United States* v. *Jacobs,* 306 U. S. 363, and *Tyler* v. *U. S.,* 281 U. S. 497, arguing that joint tenancies and tenancies by the entirety are similar to community property estates. In joint tenancies and tenancies by the entirety, there is unity of title and interest, and by reason of the doctrine of survivorship death enlarges the survivor's property rights. They have been held to be testamentary in character. The tax is laid

only upon the demise of the one that contributed the property. They were in those cases voluntary contractual situations entered into for tax avoidances. To all intents and purposes they were gifts in contemplation of death. As said by the Supreme Court of Louisiana in *Succession of Wiener,* supra:

> "Thus it may be seen that the pivotal points upon which the decisions in these two cases turned were that the wife contributed nothing, neither in money or property, toward the creation of the joint tenancy or the tenancy by the entirety, and that she was powerless to dispose of any interest in such estate by will or through legal heirship."

The opinion of the Trial Court in the case of *Dimock* v. *Corwin,* reported in 19 Fed. Supp. 56, (which was one of the two cases disposed of by the Supreme Court's opinion in the case of *United States* vs. *Jacobs,* supra) states:

> "The joint estate was created in 1916 as has been said, a few months prior to the adoption of the estate tax. The chances are that the purpose of Mr. and Mrs. Folger was not entirely unrelated to the possible enactment of such legislation."

This was said in support of the ruling that the whole of the joint tenancy, created before the Estate Tax was enacted, was to be included in the gross estate of the decedent instead of merely

a one-half interest which might have been partitioned, severed, or sold by the decedent during his lifetime had he seen fit to defeat the wife's right to take under the doctrine of survivorship. In this connection, the Court further said:

> "Had there been a severance in this case, it may be assumed that a tenancy in common would have been brought about, and the present issue would not have arisen."

The Circuit Court of Appeals in affirming the judgment of the Trial Court (99 Fed. (2d) 799), said:

> "Congress has placed this tax on all joint estates because they accomplish the result of transferring the decedent's property to the surviving spouse. But Congress has excluded any portion of the property which does not represent such a transfer. * * * Congress has provided that all such transactions be included without causing an inquiry in each case, whether the particular gift was designedly made to evade the tax."

There was no opinion by the Trial Court in the companion case determined by the Supreme Court in *United States* vs. *Jacobs,* supra, but the opinion of the Circuit Court of Appeals is reported in 97 Fed. (2d) 784 (*Jacobs* v. *United States*). That Court affirmed the judgment of the Trial Court, holding that only one-half of a joint tenancy created prior to the enactment of the Fed-

eral Estate Tax was to be included in the gross estate of the decedent. The Circuit Court rested its opinion upon the distinctions between a joint tenancy and a tenancy by the entirely, pointing out that a joint tenant has a right to sell his interest and may sue for partition. The Circuit Court cited the case of *Knox* v. *McElligott,* 258 U. S. 546, and quoted from that opinion as follows:

> "From the structure of the act to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

It is true that the opinion of the Circuit Court just referred to was reversed by the Supreme Court in *United States* v. *Jacobs, supra.* However, the Supreme Court found that the distinctions between a joint tenancy and a tenancy by the entirety were not sufficient to prevent the inclusion of the whole estate, saying:

> "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of *common law* property concepts and ancient fictions. * * *
>
> "In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for the purposes of

taxation. * * * Only a fiction stands between the two. *Survivorship is the predominant and distinguishing feature of each.* * * *

"While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had *no right to dispose of her interest by will, nor could it pass to her legal heirs.* She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her cotenant, the wife could have severed the joint tenancy *and thus have escaped the application of the estate tax of which she complains.*"

The fundamental basis of the decision in the case of *Tyler v. United State, supra,* is thus stated in the opinion of the Court.

"* * * To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect to tenancy by the entirety so as to produce in the survivor the right of *sole*

proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to *prevent an avoidance,* in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. *Taft* v. *Bowers,* 278 U. S. 470, 482."

The Statutes involved in those cases did not purport to require the inclusion in the gross estate of whichever spouse died first, as does the Statute here involved, but merely made this requirement as to the estate of the donor of the property involved just as is done in the case of ordinary gifts made in contemplation of death.

Such situations are not analogous to the case of the community property as known to the State of Texas. Community property cannot be partitioned during the marriage, and the wife or husband could not sever the joint estate and thus escape the application of the Estate Tax, except by severing the marital relation. *McDonald* v. *Stevenson,* 245 S. W. 777; *Kellett* v. *Trice,* 95 Texas, 160. On the other hand, either spouse can dispose of his or her respective interest by will and in the absence thereof each spouse's share passes to the descendants, if any, instead of to

the survivor. There is no right of either spouse to take the other's half under the doctrine of survivorship, but only by will, or by inheritance if there are no descendants. Moreover, the community interests of the spouses vest upon acquisition as in the case of tenants in common, and do not arise from the gift or voluntary action of either spouse, while the converse was true of the joint estates involved in the *Jacobs* and *Tyler* cases. The community relationship constitutes a partnership in which the husband is primarily the managing partner, although not always because the wife has management of a portion of the community property; and management may by legislative action be taken away or conferred upon the other spouse without running contrary to the constitutional community property rights guaranteed by the State Constitution and its laws, and entitled to protection under the Federal Constitution.

In view of the foregoing, the Court deems it unnecessary to pass on the remaining questions raised by the plaintiff, to-wit, that the statute in question is a direct tax void because unapportioned and also that it invades the powers reserved to the States, in violation of the Tenth Amendment.

Judgment is accordingly rendered on this 2nd day of March, 1945, that plaintiff recover of defendant the sum of Six Thousand Nine Hun-

dred Thirty-Seven and 76/100 Dollars ($6,937.76), together with interest thereon from date of this judgment at the rate of 4% per annum.

ALLEN B. HANNAY,
Judge Presiding.

Filed March 2, 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, APPELLANT

v.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The only previous opinion in this case is that of the District Court (R. 13–26) which is reported in 59 F. Supp. 483.

JURISDICTION

The judgment of the District Court was entered on March 7, 1945. (R. 12–13.) A motion was filed by the United States on March 9, 1945, to amend the findings of fact and conclusions of law and to correct the amount of the judgment. (R. 26–27.) On March 13, 1945, this motion was de-

nied except as to the correction of the amount of the judgment. (R. 27–28.) The petition for appeal was filed on March 30, 1945, and was allowed by the District Court on March 31, 1945. (R. 28–29.) This Court noted probable jurisdiction on May 7, 1945. (R. 33.) The jurisdiction of this Court rests upon Section 2 of the Act of August 23, 1937, c. 754, 50 Stat. 751.

QUESTION PRESENTED

Whether Section 402 (b) (2) of the Revenue Act of 1942 is unconstitutional.

CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER AUTHORITIES INVOLVED

The constitutional provisions, federal statutes and Treasury Regulations involved are set forth in Appendix A of the Government's brief in *Fernandez* v. *Wiener*, No. 58. Excerpts from the relevant committee reports are set forth in Appendix B of our brief in the *Wiener* case.

The Texas statutory provisions relating to community property are set forth in the Appendix hereto, *infra*, pp. 19–25.

STATEMENT

This is an action brought by the administrator of the estate of Ernst Herbst for the recovery of an alleged overpayment of federal estate taxes upon the estate of Herbst. The case was submitted upon the pleadings and a stipulation of facts. (R. 9, 14.) The facts as thus disclosed may be summarized as follows:

Decedent was married on February 12, 1901, and died on November 17, 1943, leaving surviving his wife, their child, and grandchildren. (R. 4, 9.) From the date of marriage on February 12, 1901, until 1934, decedent's principal business activity was that of raising livestock or ranching which was conducted on a ranch in Comal County, Texas. Decedent and his wife lived on this property during the greater portion of their married life. It was acquired largely on the credit of and paid for out of savings from his ranching business. The residue was saved and invested from time to time. (R. 10.)

In 1934, the decedent and his wife moved from their ranch to the town of New Braunfels, Texas, where they lived until the decedent's death. After this move the ranch was rented to the decedent's son-in-law at an annual rental of approximately $900 per year. In addition to this rental approximately $200 a year was received for hunting leases upon this ranch. After moving to New Braunfels, the decedent confined his business activities to making loans and investments out of the aforesaid savings and receipts and to attending thereto. (R. 11.)

On October 20, 1937, the decedent inherited from his brother an undivided one-seventh interest in certain ranch land in Kinney County, Texas. Thereafter decedent rented his interest at an annual rental of approximately $400. These rentals he deposited in the bank account in which

he deposited receipts from all other sources and from which all personal and family expenses were paid as well as all business expenses and the cost of investments. The decedent did not segregate or maintain the identity of these rental receipts. (R. 11.)

During their marriage neither the decedent nor his wife was ever employed by anyone at a wage or salary and neither received during that time any commissions, fees, or similar compensation for services rendered to another. (R. 11.) At the time of his death the decedent's separate property consisted of the undivided one-seventh interest inherited from his brother in the ranch in Kinney County, Texas, valued at $12,831.20. The community property of the decedent and his surviving wife totaled $102,783.99. (R. 10.) All of the community property represented accumulations from the business of raising livestock and rentals, interest and dividends on properties acquired with those savings, except to the extent that the rentals derived from the decedent's one-seventh interest in the ranch property in Kinney County, Texas, may have gone into these investments. (R. 11.)

In the estate tax return filed with respect to the Herbst estate, only one-half of the value of the community property was reported. A deficiency was determined upon the ground that there should have been included in the gross estate the full

value of all of the community property. (R. 4–5, 9.) The deficiency was paid, and following rejection of a claim for refund this action was begun. (R. 3, 8.) The District Court held that the amendments made to Section 811 of the Internal Revenue Code by Section 402 (b) of the Revenue Act of 1942 are unconstitutional (R. 13–26) and entered judgment for the plaintiff (R. 12–13, 27–28).

As has been noted, the case was submitted upon the pleadings and a stipulation of facts and the court below found (R. 14) "as the facts," which it incorporated in its opinion by reference, "the allegations of fact contained in the complaint, to the extent they were admitted by defendant's answer, and the additional facts contained in the written stipulation filed herein by the parties". Nowhere in the pleadings or in the stipulation is there any statement that the decedent's wife contributed any personal efforts to the building up of the community estate. Nevertheless the court's opinion stated that the community estate (R. 14) "as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife". It stated further (R. 19) that "It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate". The Government there-

upon filed a motion (R. 26–27) which pointed out that the statements were without any basis in the Record and requested the court to eliminate them from the opinion. The motion was denied without opinion. (R. 27–28.)

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors appears at R. 28–29. The first four may be summarized by the statement that the court below erred in holding that Section 402 (b) of the Revenue Act of 1942 is unconstitutional. The fifth assignment is directed to the suggestion in the opinion below that the community property here involved was acquired through the joint work of both the decedent and his wife.

ARGUMENT

This is a companion case to *Fernandez* v. *Wiener*, No. 58. We respectfully refer the Court to our discussion of the constitutional questions in our brief in the *Wiener* case and shall confine this brief to matters not dealt with therein.

1. The wife's interest under Texas community property law

As in Louisiana, the Texas wife's interest in the community property consists chiefly of the right to receive a portion of the property in existence at the time of dissolution of the community. *First Nat. Bank of Brownwood* v. *Hickman*, 89 S. W. 2d 838 (Tex. Civ. App.). Either spouse

may dispose of half of the property by will and the survivor will take the other half. Speer, Law of Marital Rights in Texas (Third Ed.), Sec. 315. Unlike the Louisiana wife, the Texas wife has no right to a fixed share in the event of divorce, the statutes authorizing the court to divide the property in such way as shall seem "just and right, having due regard to the rights of each party and their children, if any". Article 4638, Vernon's Texas Civil Statutes, Appendix, *infra; Hedtke* v. *Hedtke,* 112 Tex. 404; Speer, Law of Marital Rights in Texas (Third Ed.), Sec. 627. Nor is there any provision whereby she can, in any circumstances, obtain a separation of property without securing a divorce. Cf. *Gonzales* v. *Gonzales,* 117 Tex. 183.

During the existence of the community[1] the husband has in general the sole right to deal with and dispose of the property (Article 4619, Appendix, *infra; Cushenberry* v. *Profit,* 153 S. W. 2d 291 (Tex. Civ. App.)), and the wife's joinder or consent is unnecessary (*Cates* v. *Green,* 114 S. W. 2d 592 (Tex. Civ. App.); *Griffin* v. *Troup Independent School Dist.,* 163 S. W. 2d 412 (Tex. Civ. App.)). The Supreme Court of Texas has re-

[1] In Texas the spouses cannot by contract, either ante- or post-nuptial, agree that the community property system shall not apply. But after the property has come into being it may be converted by gift into the separate property of one of them. *Strickland* v. *Wester,* 131 Tex. 23. *Myles* v. *Arnold,* 162 S. W. 2d 442 (Tex. Civ. App.).

ferred to his control over the property during marriage as "absolute", adding that "barring any disposition made with intent to defraud her, he may sell, barter, or give it away". *Moody* v. *Smoot*, 78 Tex. 119, 123. More recently it has been said with respect to her "equal" interest in the community property (*McJunkin* v. *Republic Nat. Bank of Dallas*, 131 S. W. 2d 1085, 1089 (Tex. Civ. App.)):

> * * * her right is passive; his is active, and Texas Jurisprudence gives him the absolute control and disposition of the property. The husband has, and usually does exercise dominion over the entire property.

See also *Locke* v. *Locke*, 143 S. W. 2d 637 (Tex. Civ. App.).

Ordinarily the husband has the sole right to bring actions on behalf of the community property, even including actions for damages for personal injuries to the wife (*Roberts* v. *Magnolia Petroleum Co.*, 142 S. W. 2d 315 (Tex. Civ. App.), writ of error refused, 135 Tex. 289), and even where the action is to recover upon an obligation arising out of a business conducted by the wife (*Gist* v. *Tsesmelis*, 153 S. W. 2d 277 (Tex. Civ. App.)). In actions involving the community property the wife is not a necessary party and a judgment against the husband will conclude her even though she is not a party. *Starr* v. *Schoellkopf Co.*, 131 Tex. 263. This is true whether the

husband is plaintiff or defendant, and even where he has abandoned her. *Hall* v. *Aloco Oil Co.,* 164 S. W. 2d 861 (Tex. Civ. App.).

Except for that part of it which consists of her personal earnings or the income from her separate real estate, bonds, notes and stocks (Article 4616, Appendix, *infra*), all of the community property is subject to his debts (*Ochoa* v. *Edwards,* 189 S. W. 1022 (Tex. Civ. App.), writ of error refused, 196 S. W. XV; *Lovejoy* v. *Cockrell,* 63 S. W. 2d 1009 (Tex. Comm. App.)), and may be sold to satisfy a judgment against him alone (*Hornsby* v. *Hornsby,* 127 Tex. 474, 478; *Cowan* v. *N. O. Nelson Mfg. Co.,* 34 S. W. 1045 (Tex. Civ. App.); *Seabrook* v. *First Nat. Bank,* 171 S. W. 247 (Tex. Civ. App.)). Even that part of the community property which by Article 4616 is declared not to be subject to the payment of debts contracted by the husband (her earnings and the income from her separate real estate, bonds, notes, and stocks), is subject to debts contracted by him when it has been converted into other property. *Strickland* v. *Webster,* 131 Tex. 23.

Aside from her right to an injunction to prevent the husband's disposition of the property during the pendency of divorce proceedings (Article 4635, Appendix, *infra*), she may interfere with his disposition of the community property only upon a showing that he intended to defraud her. Thus, in the absence of a showing of an intention

to defraud her, his power even to give the community property away has been sustained. *Dunn* v. *Vinyard,* 234 S. W. 99 (Tex. Civ. App.), affirmed, 251 S. W. 1043 (Tex. Comm. App.); *Shaw* v. *Shaw,* 28 S. W. 2d 173 (Tex. Civ. App.). See Huie, Community Property Laws as Applied to Life Insurance, 18 Tex. L. Rev. 121, 126 (1940).

Her powers with respect to the property are in comparison very narrow. They are limited first by the fact that the common law disabilities of coverture still exist to a substantial extent in Texas. Except as there have been statutory modifications in specific instances, a married woman has no power to contract. To the extent that she is empowered to manage her separate property,[2] or the community property, she has implied power to contract for such expenses as are incidental to that management. She may also contract for necessaries for herself and her children. And she can, when joined by her husband, be a joint maker of a note or surety on an obligation of another. But except in these specific respects she cannot incur any personal liability for debts. *Lee* v. *Hall Music Co.,* 119 Tex. 547; *Keith* v. *Allen,* 153 S. W. 2d 636 (Tex. Civ. App.). Thus she is without capacity to execute a note as a renewal of an obligation incurred by her prior to

[2] She is entitled to manage her separate property except that the husband must join in conveyances of real estate and in transfers of stocks and bonds. Article 4614, Appendix, *infra.*

marriage (*John F. Grant Lbr. Co.* v. *Jones,* 139 Tex. 647), and she cannot be held liable as an individual underwriter on a contract of insurance (*Harris* v. *Prince,* 132 Tex. 231). Her capacity to contract for necessaries is limited to those for herself and children. It does not extend to necessaries for the husband. Therefore she is not liable on a note executed jointly with her husband in payment of a truck which was purchased by him to use in order to support and maintain the family. *Humbles* v. *Hefley-Stedman Motor Co.,* 127 S. W. 2d 515 (Tex. Civ. App.). And she is not liable for medical services rendered to her husband even though they were rendered at her request. *Petersen* v. *Berry,* 99 S. W. 2d 1025 (Tex. Civ. App.). Nor can she contract so as to make herself personally liable for the purchase money of real estate. *Loan Assn.* v. *Abernathy,* 129 Tex. 379.

With respect to community property she may in general charge it for debts only for necessaries. Articles 4621 and 4623, Appendix, *infra.* Conversely, neither she nor her separate estate is liable for community debts. *Lusk* v. *Parmer,* 114 S. W. 2d 677 (Tex. Civ. App.). In special circumstances, as where the husband is disabled from managing the property because of imprisonment or insanity, she may manage the property in order to preserve it. *Ulmer* v. *John Hancock Mut. Life Ins. Co.,* 161 S. W. 2d 862 (Tex. Civ.

App.). When he has abandoned her and she is not at fault, she may sue on behalf of the community. (*Crowder* v. *Crowder,* 111 S. W. 2d 1161 (Tex. Civ. App.); *Savage Oil Co.* v. *Johnson,* 141 S. W. 2d 994 (Tex. Civ. App.)), and she may sue for damages for personal injuries to herself if he refuses to bring suit. (*Dixie Motor Coach Corp.* v. *Watson,* 138 S. W. 2d 314 (Tex. Civ. App.)). She may also manage or dispose of the community property for the support of herself and her family where he has abandoned her, but this does not mean that her power of disposition supplants his, for despite the abandonment he nevertheless possesses a concurrent power of disposition. *Hall* v. *Aloco Oil Co.,* 164 S. W. 2d 861 (Tex. Civ. App.).

Where they have been separated and living apart for many years she may bring an action to cancel his conveyances of community property when the object of the action is to prevent dissipation of the property and to protect her interests therein (*Mahoney* v. *Snyder,* 93 S. W. 2d 1219 (Tex. Civ. App.)), and he may not make a gift of the property if his purpose is to defraud her. He is prohibited from contracting debts on account of the community after institution of a suit for divorce and any alienation of lands made by him after that time may be set aside if shown to have been "made with a fraudulent view of injuring the rights of the wife". Article

4634, Appendix, *infra*. *Moore* v. *California-Western States Life Ins. Co.*, 67 S. W. 2d 932 (Tex. Civ. App.); *Aaron* v. *Aaron*, 173 S. W. 2d 310 (Tex. Civ. App.).

As in Louisiana the rights of the parties rest upon a fictional basis for they do not depend upon an actual discharge of the marital duties. The community continues even though they have been separated (*Kearse* v. *Kearse*, 262 S. W. 561 (Tex. Civ. App.), affirmed, 276 S. W. 690 (Tex. Comm. App.)), and the husband's community interest in the wife's earnings continues even though he abandons her and fails to contribute to her support (*Carter* v. *Barnes*, 25 S. W. 2d 606 (Tex. Comm. App.)).

It is interesting to observe that the Texas law makes a distinction between classes of community property according to their source, a distinction very similar to that made by the federal statute. In Texas the wife was from 1913 to 1925 entitled to manage that part of the community property which consisted of her personal earnings and the income from her separate lands, bonds, notes and stocks. Speer, Law of Marital Rights in Texas (Third ed.), Sec. 347. Although the management of that part of the property is now vested in the husband, it is still provided that it shall not be subject to debts contracted by him, or to liability for his torts. Article 4616. And conversely, it is provided that no part of the community property

other than her earnings and the income from her separate lands, bonds, notes and stocks, shall be liable for debts contracted by her, except for necessaries furnished her or her children. Articles 4621, 4623. See *Foster* v. *Hackworth*, 164 S. W. 2d 796, 798 (Tex. Civ. App.).

2. The references by the court below to the efforts of the decedent's wife in building up the community estate

We are somewhat in doubt upon the question whether these references by the court below were intended as findings of fact or as conclusions of law. It was agreed that the case would be submitted upon the pleadings and stipulation of facts (R. 9), the case was so submitted, and the court found "as the facts" (R. 14) those which were disclosed by the pleadings and the stipulation. Since neither in the pleadings nor in the stipulation was there any intimation that the community property was in any degree attributable to the efforts of the decedent's wife, it might be thought that the court below did not intend its references to her alleged efforts to be findings of fact. This interpretation also follows from the fact that the references do not appear as part of a separate statement of facts as is required by Rule 52 of the Federal Rules of Civil Procedure and it ought not to be presumed that the rule was violated by the District Court. On the other hand the references have the sound of findings of fact since they deal wholly with factual matter. Whether

the wife contributed any efforts at all toward the accumulation of the community property, or if she did contribute any, what was their scope and extent, are pure matters of fact; they are hardly questions of law. But whether the statements were intended as findings of fact or conclusions of law, they are supportable only if they have some basis in the record, and we submit that they are completely without any such foundation.[3] Indeed, so far as the record shows, the wife may not have performed even the household duties.

In this connection we think it proper to add that the absence of any such basis in the record

[3] We construe the court's first statement (R. 14) as meaning that there is a general custom whereby a Texas wife contributes personal services which build up the community estate, and the second statement (R. 19) as a more qualified assertion as to the supposed custom, though it is difficult to say what limitation was intended by the use of the phrase "husbands and wives situated as were the decedent and his wife," since the record shows nothing as to the situation of decedent and his wife in reference to this matter. We gravely doubt that such a general custom exists, or, if it does exist, that it is so notorious or universally understood and accepted that the court below was warranted in assuming that the matter could be judicially known. *Minnesota* v. *Barber*, 136 U. S. 313; American Law Institute, Model Code of Evidence (1942), Rule 802. Moreover, if such a general custom did exist, it would afford no basis for the court to conclude that in this particular case the joint work of the spouses contributed to the community estate, nor would it, in the absence of supporting evidence in the record, justify the court in arriving at such a conclusion on the basis of "common knowledge." *First Nat. Bank* v. *Anderson*, 269 U. S. 341; *Ohio-Bell Tel. Co.* v. *Commission*, 301 U. S. 292; *Timson* v. *Manufacturers Coal & Coke Co.*, 220 Mo. 580.

for the court's statements was not the result of mere oversight. At the time when the stipulation was entered into between the parties, the appellee suggested that it include a statement similar in import to those which the court below made and submitted affidavits in support thereof. The Government declined to agree to this upon the ground that it was, at that time, without knowledge as to the facts and it would be necessary to conduct an investigation in order to ascertain them. The appellee thereupon agreed that that statement be eliminated from the stipulation. This, however, still left the possibility that the appellee might at the trial offer evidence in an attempt to show such facts and it would therefore still have been necessary for the Government to conduct an investigation in order to be prepared to meet that issue. The appellee, being desirous of securing a trial at the earliest possible time, submitted a revised stipulation eliminating therefrom any reference to the activities of the wife in the production of community property and providing in the last sentence in paragraph one thereof, "It is stipulated that this cause shall be submitted on this agreed statement of facts and the pleadings." (R. 9.) The Government consented to an early trial inasmuch as the stipulation eliminated any such question from the case and obviated the necessity of an investigation by the Government. The references by the court below to this subject are, therefore, particularly unjustifiable in the

light of the steps which were taken to eliminate this issue from the case.[4]

The matter would probably not deserve detailed attention if it did not form the basis for a series of unwarranted assumptions by the court below, from which it then concluded that the statute imposes impossible burdens of proof. (R. 19.) Having made the unjustifiable assumption that the wife here contributed services to the accumulation of the community property, the court then made the further assumption that those services were not capable of being evaluated. But as this Court has held (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 352), "Impossibility of proof

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[4] A court may not, by the use of judicial notice, raise and decide an issue which the parties have not presented. "* * * the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading. The averments brought no controversy in this regard into court, in respect of which resort might be had to judicial knowledge." *Mountain View Min. & Mill. Co.* v. *McFadden*, 180 U. S. 533, 535. Accord: *Arkansas* v. *Kansas & Texas Coal Co.*, 183 U. S. 185, 190; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 312. See American Law Institute, Model Code of Evidence (1942), Rules 803, 804. Cf. *First Nat. Bank* v. *Anderson*, *supra*, p. 354. And, since it is only the function of judicial notice to relieve a party from making proof by the usual forms of evidence, its use should not be availed of to prevent his opponent from disputing a matter which is capable of contradition. *Ohio Bell Tel. Co.* v. *Commission*, *supra*, pp. 301–302. See also, *State* v. *Kincaid*, 133 Ore. 95, 103–104. Nor should judicial notice be taken of a matter which is actually disputed by one of the parties. *State ex rel. Huff* v. *Reeves*, 5 Wash. 2d 637.

may not be assumed." And as we have pointed out in our brief in the *Wiener* case (p. 55) such an issue could arise only after a claim was made that some part of the property was attributable to her efforts, all available facts had been submitted in substantiation of the claim, and the claim had nevertheless been rejected. Not only was no such claim made in this case, but no such issue was before the court.

CONCLUSION

The judgment of the District Court is erroneous and should be reversed.

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SEPTEMBER, 1945.

APPENDIX

Vernon's Texas Civil Statutes, Vol. 18:

ART. 4613. *Husband's separate property.*—All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal.

ART. 4614. *Wife's separate property.*—All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. The wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and

bonds belonging to her or of which she may be given control by this law.

ART. 4615. *Compensation for personal injuries to wife.*—All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

ART. 4616. *Wife's separate property protected.*—Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband.

ART. 4617. *When wife may convey, etc.*—If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county of her residence, and the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder.

In event the wife is a non-resident, she may apply to the district court of the county where the property, or a portion thereof, is situated, and the court shall hear

and determine such application and grant relief the same as if the applicant were a resident of this State.

* * * * *

ART. 4619. *Community property.*—SEC. 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a femme sole.

SEC. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a nonresident of this State at the time of disappearance, or of any

county in which the community property or part thereof is situated in which petition the wife shall set forth the facts entitling her to control, manage and dispose of the community property under the provisions of this article.

SEC. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

SEC. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall be not less than ten days prior to such date set for such hearing.

SEC. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage and dispose of the community property under the provisions of Section I of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said

petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be recorded in the deed records of other counties in which the property of said community estate may be situated.

ART. 4620. *Community property liable for debts.*—The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law.

ART. 4621. *Community property not liable.*—The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision.

ART. 4622. *Funds in bank.*—Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

ART. 4623. *Subject to debts of wife.*—Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to

the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.

ART. 4624. *Judgment and execution.*—Upon the trial of any suit as provided for in the preceding article, if it shall appear to the satisfaction of the court and jury that the debts so contracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff.

* * * * *

ART. 4634. *Debts created after suit.*—On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

ART. 4635. *Inventory and appraisement.*—At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restrain-

ing him from disposing of any part thereof in any manner.

ART. 4636. *Temporary orders.*—Pending suit for a divorce the court, or the judge thereof, may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable.

ART. 4637. *Alimony.*—If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case.

ART. 4638. *Division of property.*—The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,

Appellant,

v.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED,

Appellee.

On Appeal From the District Court of the United States For the Western District of Texas

BRIEF FOR THE APPELLEE

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MERCIAL RECORDER, FORT WORTH, TEXAS 10-24-45 350

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No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,
Appellant,

v.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED,
Appellee.

On Appeal From the District Court of the United States For the Western District of Texas

BRIEF FOR THE APPELLEE

Nature of Case

The Texas wife earns, and owns as acquired, half of all community property. Her interest is not acquired from her husband by gift or otherwise. The 1942 Revenue Act for the first time disregards this and levies an estate tax on most community property when the first spouse dies, and taxes the survivor's one-half at the second death.

The Court below held that this violated constitutional requirements.

This case and No. 58 from Louisiana are test cases involving the same questions.[1]

[1] Appellants' constitutional arguments are contained only in the brief in No. 58. Our references to the two briefs will be followed by the distinguishing words "Louisiana" and "Texas."

Opinion Below

The opinion of the United States District Court for the Western District of Texas (R. 13) is reported at 59 F. Supp. 483.

Jurisdictional Statement

The District Court held against the constitutionality of Section 402(b) of the Revenue Act of 1942, (R. 20). Judgment was rendered March 7, 1945 (R. 12). The United States of America, defendant below, filed its petition for appeal to this Court on March 30, 1945 (R. 28), and the order allowing this appeal was entered on March 31, 1945 (R. 29). The record was filed in this Court on April 13, 1945.

This Court has jurisdiction of this cause by virtue of Paragraph 349a, Title 28, of the United States Code. (Act of August 23, 1937, C. 754; 50 Stat. 751).

Constitutional Provisions, Statutes and Regulations Involved

The pertinent Federal Constitutional and Statutory provisions and Treasury Regulations are contained in Appendix A, page 93, infra.

Excerpts from the Committee Reports on the 1942 Revenue Bill are contained in Appendix B, page 109, infra.

The pertinent provisions of the Constitution and Statutes of the State of Texas are contained in Appendix C, page 114, infra.

STATEMENT OF THE CASE

Questions Presented

By Section 402 (b) of the Revenue Act of 1942, the Congress amended Section 811(e) of the Internal Revenue Code to require that the following property should be included in the gross estate of a decedent (whether husband or wife):

> "To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation, or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

The questions presented are whether the above statutory provision as applied to the estate of the decedent violated the Due Process Clause of the Fifth Amendment, the Uniformity Clause of Art. 1, Sec. 8, the Direct Tax Provisions of Art. 1, Secs. 2 and 9, and the provisions of the Tenth Amendment to the Constitution of the United States.

Facts

Ernst Herbst died at New Braunfels, Texas, on November 17, 1943, survived by his wife, Natalie, a

child and grandchildren (R. 4, 8). He and his wife had resided together in Texas from their marriage there on February 12, 1901, to his death (R. 10). He left a will, which was duly probated, in which he undertook to devise only his one-half of the community property. This will appointed the surviving wife executrix. Upon her death (and that of the successor executor named therein), Appellee was duly appointed administrator de bonis non, and acts here, and has acted at all pertinent times, in that capacity (R. 4, 8).

At his death Herbst was possessed of one item of separate property (an interest valued at $12,831.20, in a ranch which he had inherited from his brother in 1937) and his one-half of the community estate which then belonged to him and his wife of a total value of $103,783.99 (R. 10, 11). Herbst's administrator duly filed a federal estate tax return reporting this separate property and one-half of the community property at values which, with deductions claimed and the statutory exemption, disclosed no estate tax due. This return was duly examined by officers of the Bureau of Internal Revenue, and an estate tax of $6,937.76 determined, assessed and collected. A proper refund claim was duly filed and rejected, and this suit followed (R. 4, 5, 8).

The primary cause for this determination and assessment, and the only matter in issue here, was the inclusion in decedent's gross estate of all, rather than one-half, of the community property which had belonged to decedent and his surviving wife. Her share was so included only because of the provisions of Sec-

tion 402(b) of the Revenue Act of 1942, amending Section 811(e) of the Internal Revenue Code (R. 5, 8).

It was established by stipulation and by admission of the allegations of plaintiff's complaint that neither the decedent nor his wife had any property at their marriage, and that neither acquired any thereafter by gift, devise or descent, except the interest in the separately-owned ranch inherited by the decedent in 1937, as aforesaid. During their marriage neither the decedent nor his wife was ever employed by anyone at a wage or salary, and neither received any fees, commissions or similar compensation for personal services rendered to another (R. 11). From marriage until 1934, decedent's principal business was that of raising livestock on a small ranch on which he and his wife lived during that time. The ranch was acquired largely on credit, and was owned as community property at decedent's death. The ranch was paid for out of savings from this ranching business. Further savings were invested, chiefly in stocks, bonds and mortgages (R. 10-11).

In 1934 decedent and his wife left this ranch and thereafter rented it. After this, decedent's business activities were limited to making and managing loans and similar investments out of the aforesaid savings. The entire gross revenue derived by decedent from his separate real estate did not exceed $2,800 ($400 per year for seven (7) years) during the entire time he owned it. These revenues were deposited in the bank account in which receipts from all other sources were deposited (R. 11).

All property, separate and community, was located in Texas (R. 4, 8, 10).

The Court below stated:

> "The factual situation presented by this record is a typical one—one which, with minor and unimportant variations, exists as to many husbands and wives in Texas.[1] Herbst and wife had no property at the time of their marriage in 1901. Until 1937 neither acquired any property by gift, devise or descent. Neither ever received compensation for personal services rendered to anyone. He, a stock farmer, and his farmer wife, living together on a small ranch acquired after marriage largely on credit, gradually acquired a comparatively substantial estate, which, as a matter of common knowledge, was attributable to the joint work of both the decedent and his wife." * * * * (R. 14).

> "It is a matter of common knowledge, and this Court judicially knows, that husbands and wives situated as were the decedent and his wife, contribute personal services to the building up of the community estate. Their respective services, no matter how detailed their records may be, are impossible separately to evaluate." (R. 19).

The Court then held that all of the community property on hand at decedent's death was owned in equal shares by him and his wife, and that the statute,

[1]According to the last census Texas had a total population of 6,414,824, of which the rural farm and ranch population was 2,149,187 (Texas Almanac 1943-1944, Page 63). That the Court may take judicial notice of census figures, see **Parker v. Brown**, 317 U. S. 341, 363.

in measuring decedent's estate tax by including the wife's half of the community property, violated the Due Process and Uniformity Provisions of the Constitution. (R. 16, 26).

Summary of Argument

I.

(a) Congress, by the 1942 Amendment to the Internal Revenue Code here involved, enacted a statute which required that upon the death of either husband or wife, all community property be included in the gross estate of the decedent, except that traceable to the separate property of, or compensation earned by, the surviving spouse. In so doing Congress asserted that the wife's ownership of community property was fictional and that the recognition previously accorded this ownership produced discrimination. As will be shown hereafter, both assumptions were erroneous.

(b) As this Court held in *Hopkins v. Bacon*, 282 U. S. 122, community property in Texas belongs jointly and equally to husband and wife, throughout marriage, and each spouse has with respect thereto all rights and powers necessary to full ownership by any test. The spouses are, essentially, partners, with divided managerial powers, for the faithful exercise of which each is accountable to the other. The wife's interest in community property vests in her in virtue of Texas law and does not come, donatively or otherwise, from her husband. Texas law and decisions afford her all remedies necessary to protect her rights to community property. She has full power of testamentary disposition over her equal share, and neither

spouse has the right of survivorship. If it were appropriate for this Court to re-examine the holding in *Hopkins v. Bacon, supra,* the conclusion there announced would be sustained.

(c) The method by which the estate tax was applied to community property, prior to the amendment in question, did not produce discrimination. As to all property, community or otherwise, the fundamental basis of the tax was property owned at death. A tax based upon ownership can not be discriminatory, but the departure from that basis, accomplished by the amendment in question, necessarily produces discrimination, injustice and confiscation.

II.

(a) In the light of the foregoing principles, it is clear that the tax imposed upon the decedent's estate was measured in part by his wife's property. The decedent did not own this property at death; he had never owned it; and he had never made a disposition of it, donative or otherwise. The statute, therefore, is invalid under the rule established by many decisions of this Court, that a tax upon A measured in whole or in part by the value of property belonging to B violates due process. *Hartman v. Greenhow,* 102 U. S. 672; *Knowlton v. Moore,* 178 U. S. 41; *Hoeper v. Tax Commission of Wisconsin,* 284 U. S. 206; *Nichols v. Coolidge,* 274 U. S. 531; *Heiner v. Donnan,* 285 U. S. 312.

(b) The shift of managerial control (which Appellants mis-name a transfer of property rights or economic benefits) will not save the statute. Its ap-

plication is not limited to those cases where death shifts managerial control from one spouse to another. But if it were, such a shift in control does not transfer property rights or economic benefits and, therefore, could not justify taxing the one formerly exercising control upon the other's property. *Reinecke v. Northern Trust Company*, 278 U. S. 339. If the statute could validly depend upon a shift of managerial control when the husband dies first, it is invalid when the wife dies first and no such shift results. The amending section is inseparable and is, therefore, wholly invalid. *Pollock v. Farmers' Loan & Trust Company*, 158 U. S. 601, 636; *Butts v. M & M Transport Company*, 230 U. S. 126, 134; *United States v. Reese*, 92 U. S. 214; *Hill v. Wallace*, 259 U. S. 44.

(c) The *Tyler* (281 U. S. 497), *Jacobs* (306 U. S. 363), *Whitney* (309 U. S. 530), and *Moffitt* (218 U. S. 400) cases do not support Appellants' position. In those cases there was either a donation from the decedent to the survivor with a right of survivorship (the *Tyler* and *Jacobs* cases), a shifting of economic benefits evidenced by the decedent's previous enjoyment of income and exercise of testamentary power *(Whitney v. Tax Commission)*, or an inheritance of the property by the survivor as heir of the decedent *(Moffitt v. Kelly)*. There is a complete absence of each of these controlling factors in the present case.

(d) In many other respects the statute is wholly arbitrary, capricious and confiscatory. It does not, and cannot validly be made to, depend upon the concept of economic attribution. *Nichols v. Coolidge*,

supra; Reinecke v. Northern Trust Company, supra. If it could be so construed, the statute either creates a conclusive presumption that all community property is economically attributable to the first spouse to die, or imposes an impossible burden of proof as to economic responsibility upon the survivor. Either renders the statute invalid. *Heiner v. Donnan, supra; Schlesinger v. Wisconsin*, 270 U. S. 230; Cf. *Mobile J & K C R Co. v. Turnipseed*, 219 U. S. 35. The statute operates retroactively to tax past lawful transactions, not testamentary in character and beyond recall. *Nichols v. Coolidge, supra; Helvering v. Helmholz*, 296 U. S. 93; *Untermyer v. Anderson*, 276 U. S. 440; *Coolidge v. Long*, 282 U. S. 582. Its utter caprice is shown by these facts and others: its application depends upon the accident of which spouse dies first; it does not protect the survivor from a second tax upon his property included in the first decedent's estate; it does not allow deduction for all debts chargeable against the property included in the gross estate, or afford the survivor an income tax basis equal to the estate tax value; it will confiscate many estates, large and small.

III.

The constitutional provisions as to uniformity in the imposition of excise taxes require that whenever an object is taxed anywhere, it be taxed everywhere at the same rate. *Knowlton v. Moore, supra.* The object of the estate tax, generally, is the transfer of property at death. *Heiner v. Donnan, supra; Knowlton v. Moore, supra.* To this have been added such donative and incomplete transfers by the decedent during lifetime as are necessary to prevent tax

avoidance. The Amendment here involved enlarges the object of this tax in the community property states only, by including in the object of the tax property never owned by the decedent and never transferred by him, donatively or otherwise. The same lack of uniformity results if the justification for the tax be the theory of economic attribution or the theory of cessation of control. In innumerable cases in non-community property states, property economically attributable to the decedent, or over which he had control until death, is not taxed as a part of his estate.

IV.

If the Appellants be right in their position that some part of the tax is to be borne by the survivor, then, to that extent, it is not an excise, but a direct tax imposed upon property solely because of its ownership. There is no excisable event. Such a direct tax is void because unapportioned. *Pollock v. Farmers' Loan & Trust Company, supra.*

V.

The Amendment also constitutes an unwarranted invasion of the power reserved to the States by the Tenth Amendment. In imposing the tax with respect to community property "held under the laws of any State," Congress levied a tax simply because of the marital property laws of certain States. Congress has no right directly to regulate marital property laws in any State. *Ohio v. Agler*, 280 U. S. 379. Nor has it the right to do this indirectly. The *Child Labor Tax Case*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44.

To permit Congress to levy this tax would be to establish a precedent by which Congress, through its taxing power, may regulate all property and marital laws in the several States.

VI.

Appellants' criticism of the action of the Court below in noticing the normal activities of husbands and wives and that the stipulated and admitted facts were typical is unjustified. No stipulation can control a Court's judicial knowledge. Without such statements in the record, this Court would take judicial notice that wives everywhere, in circumstances like those disclosed by this record, join in performing the manifold activities connected with farming and ranching. This basic fact was a prime factor in inducing the adoption and continuation of the community property system in Texas and elsewhere. The validity of this law, which in terms applies to every married couple in every community property state, cannot properly be tested by disregarding a fundamental basis for all community property systems—the spouses' equality of contribution and merit.

ARGUMENT

I.

The Taxing Statute. The Nature and Incidents of Community Property. Alleged Discrimination.

The charge of discrimination can be best answered after the taxing statute has been examined and the reality of the Texas wife's ownership of one-half of

the community property conclusively demonstrated. But we say at once that the charge that discrimination in the imposition of the estate tax existed in favor of community property states, prior to the 1942 Amendment, is predicated entirely upon the fact that the wife there is recognized as an individual capable of owning, and actually owning, property, just as she is capable of owning, and actually owns, property in other states. Recognizing a wife's ownership anywhere operates to diminish the husband's taxable estate. If, to avoid a loss of revenue, it is necessary to disregard this ownership, it can be done, if at all, only by taxing spouses as a unit everywhere. This, Congress has expressly refused to do, although recognizing that an enormous amount of revenue was lost thereby. *Ways and Means Committee Report No. 1040*, 77th Cong., 1st Sess., p. 10.

(a) THE AMENDING STATUTE. THE PREVIOUS METHOD OF TAXING COMMUNITY PROPERTY AND THE REASONS ASSIGNED BY CONGRESS FOR THE "COMMUNITY PROPERTY" AMENDMENTS.

The language of the statute[2] held invalid by the Court below is plain. Irrespective of the existence of the power of testamentary disposition or of the power of control in the decedent spouse, the statute requires that, with two exceptions, all property held in community by husband or wife be included in the gross estate of the first spouse to die, whether that spouse be the husband or the wife. The two exceptions are: (1) property "received as compensation for personal

[2]Sec. 402(b) of the Revenue Act of 1942, amending Sec. 811(e) of the Internal Revenue Code, Appendix "A", p. 98, infra.

services actually rendered by the surviving spouse, or derived originally from such compensation;" and (2) property derived "from separate property of the surviving spouse." "Compensation for personal services actually rendered" is not defined. It can only mean wages, salaries, fees, commissions and similar emoluments received for personal services rendered to another[3]. The phrase does not, as the Appellants assume throughout their briefs, include gains from

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[3]Tax statutes have always distinguished between gain from business activities and compensation for personal services. The definition of gross income includes "gains * * * * derived from salaries, wages or compensation for personal service * * * * or from professions, vocations, trades, businesses, commerce, or sales or dealings in property * * * * or the transaction of any business carried on for gain or profit." (Section 22(a) I. R. C.). The deduction for business expense includes "salaries or other compensation for personal services actually rendered." (Section 23(a)(1)(A) I. R. C.). Section 25(a)(4) of the Internal Revenue Code, defining "earned income" (repealed by Section 107, Revenue Act of 1943) used the identical language, "compensation for personal services actually rendered," and clearly distinguished between such compensation and earnings from business. See **McLarry v. Commissioner** (C. C. A. 5), 30 F. 2d 789, and **Graham v. Commissioner** (C. C. A. 9), 95 F. 2d, 174 (cited by this Court in **Lang's Estate v. Commissioner**, 304 U. S. 264). That the meaning of "compensation for personal services" was crystallized long prior to the 1942 Act is also shown by definitions of the phrases "Compensation" and "Compensation for Personal Services," collected at pages 193, 219, et seq. of Volume 8 of **Words and Phrases**, permanent ed., and the Pocket Supplement to this Volume, pages 33, 38. The phrases "received" and "actually rendered" emphasize the limitation which must be placed on this language.

farming, ranching, merchandising, trading and similar activities[1].

In this case neither spouse received compensation for personal services (R. 11). There was only an insignificant amount of revenue from the separate property which the decedent had inherited seven years prior to his death (R. 11). As applied here, the statute, if valid, plainly requires that all of the community property of the decedent and wife be included in his gross estate; and as plainly would have required that all of the same be included in the wife's gross estate had she died first.

Thus the statute is made to depend upon the sheer accident of which spouse dies first. Ownership of property at death is disregarded. If the community property is traceable to the personal earnings or the separate property of either spouse, the whole is taxable to such spouse; but should the non-producing

[1]Later portions of this brief, pp. 24-36, infra, will show that, in Texas, community property includes all acquisitions by either spouse during marriage, except property acquired by gift, devise or descent. It includes property acquired by the personal efforts of the spouses; property acquired on credit; by adverse possession or limitation; revenues from separate property; earnings of minor children; enhancement in value of community property; damages for injuries to the person or reputation of either spouse; all fortuitous gains; and, in fact, everything that the spouses acquire in any way during marriage, except that which is received by one or the other as a gift, devise or inheritance. Of the community property involved in the present case a considerable portion was acquired after marriage on credit. A considerable portion resulted from profit and revenues from the investment and reinvestment of savings. A considerable portion must represent the enhancement in value of community property, and the natural increase in livestock. The langauge of the statute, "compensation for personal services actually rendered," cannot possibly be stretched to include these classes of property.

spouse die, the testamentary power of disposition is selected as the test and one-half of the community property is taxed to such spouse. If the property is of the class involved in this case, that is, not traceable to either exception in the statute, the whole is taxed to the first to die, and, when the survivor dies, his one-half is taxed a second time. Thus 150% of the value is taxed in most cases on the death of both spouses.

This was a radical departure from prior estate tax Acts. Prior to this Amendment the statutory formula for determining the gross estate of a decedent was to include therein only that property which the decedent owned at his death, that over which he had power of testamentary disposition, and that which he had previously transferred either incompletely or in contemplation of death[1]. While there had been changes in the language defining the gross estate between the

[1]Thus, Section 202 of the Revenue Act of 1916 (the first federal estate tax law) required that there be included in the decedent's gross estate all of the decedent's interest in the property "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate"; transfers "in contemplation of or intended to take effect in possession or enjoyment at or after death, except in case of a bona fide sale for a fair consideration in money or money's worth;" and the interest in property "held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person, and never to have belonged to the decedent." Under this Act the net taxable estate was the gross estate less the exemption and deductions provided in Section 203 of the Act.

original Act of 1916 and the Internal Revenue Code as it existed prior to the Amendment of 1942, this basic formula was never departed from[6].

No estate tax law prior to the 1942 Act made any reference to community property. The Treasury Department, supported by rulings of Attorneys General of the United States, held that, in those States in which each spouse owned a present interest in community property, only the share owned by the decedent spouse was includible in his gross estate[7]. These rul-

[6]Thus, Section 810 of the Code prior to the 1942 Amendment levied a tax "upon the transfer of the net estate of every decedent," and measured that net estate by deducting from the gross estate defined in Section 811 the exemption and deductions provided in Section 812. Section 811 brought into the gross estate all of the interest of the decedent at the time of his death in property wherever situated (except real estate outside of the United States) undiminished by the dower and curtesy interests of the surviving spouse; transfers in contemplation of or taking effect at death; revocable transfers; the fractional interest of the decedent in property held in a tenancy by the entirety or a joint tenancy, plus the interest of the surviving tenant or tenants to the extent that that interest came from the decedent donatively; property passing under a general power of appointment; and certain proceeds of life insurance. Thus, each and every item of property includible in the gross estate of a decedent by any federal tax law prior to the 1942 Amendment here in question was property which the decedent owned at death or over which he had the power of testamentary disposition, or which he had previously owned and transferred donatively either in contemplation of death or incompletely.

[7]T. D. 2450, promulgated February 14, 1917; T. D. 3138, 4 C. B. 238; T. D. 3670, IV-1 C. B. 19. It was pointed out by the learned Attorney General in T. D. 3670, supra:

> "If the widow takes by virtue of her ownership in community property which is held by the community subject only to the power of disposition of the husband,

ings were consistently followed by the taxing authorities and applied by this Court and other courts up to the date of the adoption of the 1942 Amendment. See, e.g., *Lang's Estate v. Commissioner*, 304 U. S. 264; *Wardell v. Blum*, 276 F. 226 (C.C.A. 9) (certiorari denied); *U. S. v. Goodyear*, 99 F. 2d 523 (C.C.A. 9); *Commissioner v. Cadwallader*, 127 F. 2d 547 (C.C.A. 9); *Burkitt's Estate*, 3 B.T.A. 1158; G.C.M. 7773, IX-2 C. B. 426.

When the first session of the Seventy-seventh Congress was considering the Revenue Bill of 1942, it was represented to Congress, and the Committee on Ways and Means was induced to believe, that "for the purpose of federal estate taxation, husband and wife living in community property states enjoy a preferential treatment over those living in non-community property states. This is due to the fact that all of the property acquired by the husband after marriage through his own efforts in the community property state is treated *as if* one-half belonged to the wife * * * *."[8] (emphasis supplied).

Acting on this belief, Congress amended Section

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obviously the estate tax has no application. * * * * a study of the true character of that interest as it existed in the Spanish law, and as it has been developed in the jurisprudence of the community property states * * * * affords no substantial basis for the hope that a renewal of the litigation on this subject in the Federal Courts would change the result."

[8]H. Rep. 2333, 77th Cong. 1st Sess. pp. 35-37, 160, 162, 163 (1942—2 C. B. 372, 401-402, 481); S. Rep. No. 1631, Part 1, 77th Cong. 2nd Sess. p. 9 (1942—2 C. B. 673-674). These reports are set forth at length in Appendix "B", p. 109, infra.

811(e) of the Internal Revenue Code by adding thereto the statutory language heretofore quoted, (p. 3, supra), and by making changes in the gift tax provisions of the Code, as well as the estate tax provisions dealing with transfers in contemplation of death, revocable transfers, and the taxability of the proceeds of life insurance.[9] No change was made in the provisions of the Code which limited the deduction for claims and debts to those amounts which are "allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered"[10] or to the provision limiting the credit for prior taxed property to that inherited by or bequeathed to the decedent within five years of the decedent's death.[11] Nor was any amendment made to the income tax provisions dealing with the basis of property acquired from a decedent.[12] While the Act, as amended, gave the United States a lien upon the survivor's share of the community property to secure the payment of the tax,[13] no provision was made as to whether the increased tax was

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[9]Sec. 811(d)(5)-(g)(4), Internal Revenue Code, Appendix "A", pp. 97, 99, infra.

[10]Sec. 812(b) Internal Revenue Code, Appendix "A", p. 101, infra.

[11]Sec. 812(c) Internal Revenue Code, Appendix "A", pp. 102-103, infra.

[12]Sec. 113(a)(5) Internal Revenue Code, Appendix "A", p. 94, infra.

[13]Sec. 827 I. R. C., Appendix "A", pp. 104-105, infra.

to be borne by the decedent's estate only, or by the decedent's estate and the surviving spouse.

All of this, the Ways and Means Committee report said, was

> "to remedy this situation (alleged preferential treatment) by providing that such property (community property) is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. This follows somewhat the treatment which is accorded to joint estates under the existing law. The existing statute has been upheld by the Supreme Court in numerous cases * * * *. The amendment thus makes due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor."[14]

Despite the language in the Committee Reports, there is nothing in the statute which makes its application to the general bulk of community property dependent upon the activities of the decedent spouse in acquiring that property, or upon whether such decedent controlled the property, or which makes it applicable to a decedent husband, but not to a decedent wife. The actual language of the amending statute clearly requires that there be included in the gross estate of the first spouse to die, whether that spouse be husband or wife, all property, however acquired and however controlled, owned by the decedent and surviving spouse in community except that portion

[14] See Appendix "B", p. 109, infra.

identified as having been received by the survivor as compensation for personal services actually rendered by the survivor or derived from such compensation, or from the survivor's separate estate, but in no case less than the value of that portion of the community over which the decedent spouse had the power of testamentary disposition. It is this explicit language which the Court must consider to determine whether the evils which Congress pointed out actually existed, and whether the Congressional enactment violates due process, lacks geographic uniformity, is a direct unapportioned tax, or runs counter to the Tenth Amendment. Such a determination requires, first, an examination of the nature and incidents of community property in Texas.

(b) HOPKINS V. BACON, 282 U. S. 122 GOVERNS IN DETERMINING THE WIFE'S INTEREST IN TEXAS COMMUNITY PROPERTY. A RE-EXAMINATIOIN OF THE AUTHORITIES FULLY SUPPORT THAT DECISION.

The Texas community property system is based upon the humane and enlightened concept that marriage is a joint enterprise between equals, in the nature of a partnership,[15] for the accomplishment of economic as well as social objectives, all of which are

[15]In one of the earliest Texas cases (Cartwright v. Hollis, 5 Texas 152, 163) Chief Justice Hemphill said:

"* * * and the obvious purpose of the statute was to preserve from the wreck of the Spanish system of jurisprudence those rules, with some modifications, which regarded the matrimonial union, so far as property was concerned, as a species of partnership; * * * *"

This has been the dominating theory in all subsequent Texas decisions. **Moody v. Smoot**, 78 Tex. 119; **Stone v. Jackson**, 109 Tex. 385; **Leatherwood v. Arnold**, 66 Tex. 414; **Stramler v. Coe**, 15 Tex. 211; **Arnold v. Leonard**, 114 Tex. 535.

as important to one spouse as to the other; that both spouses should, and ordinarily do, contribute their full efforts to the attainment of all of the objectives to which their endeavors were pledged: that one field of marital activity is as important as the other, so that the spouses share equally, each as of right, in the economic gains. This system takes nothing which originally belonged to one spouse and gives it to the other, but rewards each equally for his or her equally valuable contributions to the common enterprise.

It is not necessary here to go extensively into the history of this ancient, democratic marital property system, which from the beginning has found special favor with pioneering people, where the wife ordinarily joins the husband in all of his efforts to gain a livelihood.[16] As the Court below pointed

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[16]In Volume 1 of his **Principles of Community Property** de Funiak says (Para. 3, Page 10):

> "'Actually, * * * * the community property system is one with its roots far back in the past, of a much more ancient lineage than that of any of the 'common law' principles, is a development of democratic rather than aristocratic societies, and was firmly established in eight of our states for generations before the advent of inheritance and income taxes.
>
> "* * * * If ours is a government of laws and not of men, as has so often been said, the community property laws of certain states are entitled to as much respect and consideration as any other laws and are as much entitled to the protection of the United States Constitution as are any other laws. * * * *"

(Para. 11, Page 27):

> "The most logical explanation, that most largely borne out by the facts, is that the causes which make the wife

out (R. 15), the community marital property system is older than the common law. It is accepted by a larger number of people and applies to a larger territory than ever was true of the common law marital property system. It was in force in Texas while Texas was Spanish territory; while Texas was Mexican territory; while Texas was a Republic, and

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the partner of the husband are economic in nature. It is among those races or among those classes of society in which the wife works shoulder to shoulder with the husband to maintain and preserve the common home and possessions, in which she contributes labor rather than the mere 'adornment' of her presence, that she is found to be the partner of her husband with an ownership in the acquests and gains of their common labor and struggles.

* * * * * * * * *

"In other words, the community system is most frequently found to exist and to continue to exist among the common masses of the people, those who do not own great worldly possessions, those who must labor from day to day to maintain themselves and their children, those among whom the husband and wife work equally together in one capacity or another. * * * * Since the United States is primarily of the latter type, the existence of the community system, even though found in only some of our states, is much more natural to our way of life, to our habits and customs, than is a system or concept of marital property rights coming to us from privileged and aristocratic classes, who, indeed, rarely cling to the community system."

Montgomery's Federal Tax on Estates, Trusts and Gifts, 944-1945, page 427.

"Whatever (tax) advantage is held in community property states is due to the fact that their early lawmakers saw fit to give full legal recognition to the toil and sacrifice of the wife as a contribution to the marriage partnership."

throughout statehood, without substantial modification.[17] The essence of the system is that all property acquired in any possible way, by either spouse during the existence of the marriage, except property acquired by either gift, devise or descent, is community property belonging jointly and equally to both spouses. *Arnold v. Leonard*, 114 Tex. 535. Thus, there fall into the community the revenues from either spouse's separate estate, whether that separate estate was owned at marriage or thereafter acquired by gift, devise or descent; all personal earnings of either spouse; all fortuitous gains of any kind; all awards for damages for personal injuries or other torts; earnings of minor children; property acquired by adverse possession or on credit after marriage; gain derived from farming, ranching, store-keeping, manufacturing, and all similar activities, even though the capital employed be initially the separate property of either spouse. In short, everything acquired by either spouse during marriage, except gratuitously, is community property under the Constitution and laws of Texas.

In 1930, when the community property system in Texas was the same as it is today, this Court was called upon to determine the nature of the spouses' ownership of community property in Texas in order to determine their respective liabilities for income

[17] "Prior to, and as a condition of Texas becoming a part of the Union, Congress by joint resolution provided that Texas was to adopt a Constitution acceptable to the Congress, and pursuant thereto the Constitution of 1845 was adopted, preserving therein the Community Property System as then recognized in Texas." Opinion below. R. 15.

es on income which was community property. The urt there considered and passed upon the nature community property in Texas and the ownership reof by Texas spouses, and recognized that the uses were equal owners of community property l income, and taxable accordingly. That case is *pkins v. Bacon*, 282 U. S. 122,[18] in which the Court d:

"The statutes contain sweeping provisions as to what shall be included in community property. They provide that each spouse shall have testamentary power over his or her respective interest in the community property. In the event of failure to exercise such testamentary power they provide that the property shall go in the first instance to the descendants of the deceased spouse. They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property. *Arnold v. Leonard*, 114 Tex. 535, 273 S. W. 799. Her interest is said to be equal to the husband's. *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200. It is held that the spouses' rights of property in the effects of the community are perfectly equiv-

[18] It is surprising that the Appellants' Texas brief makes no erence to or citation of this case or **Arnold v. Leonard**, 114 as, 535, recognized by this Court in the **Hopkins** case as leading Texas authority upon the subject. Equally surising is the fact that the briefs make no reference to the nions of the Attorneys General of the United States upon subject of community property and the applicability of eral taxing statutes to the community property system.

alent to each other. *Arnold v. Leonard*, supra. These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. *Stramler v. Coe*, 15 Tex. 211; Martin v. Moran, 11 Tex. Civ. App. 509, 32 S. W. 904; Watson v. Harris, 61 Tex. Civ. App. 263, 130 S. W. 237; Davis v. Davis (Tex. Civ. App.) 186 S. W. 775. * * * *

"* * * * In view of what has been said in No. 15 (Poe v. Seaborn, 282 U. S. 101), *it remains only to say that the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband*, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate returns, each of one-half of such income." (Emphasis supplied).

The above holding, reenforced by similar decisions as to the States of Washington, Arizona, Louisiana and California, effectively refutes the assertion in the Committee Reports that the wife is treated "as if" she owned one-half of the community property, and shows clearly that the husband and wife are joint and equal owners of all community property, however acquired.[19]

In view of the explicitness of the holding of this Court in *Hopkins v. Bacon*, supra, it should be unnecessary here to re-examine the statutes and deci-

[19]**Poe v. Seaborn**, 282 U. S. 101 (Wash.); **Bender v. Pfaff**, 282 U. S. 127 (La.); **Goodell v. Koch**, 282 U. S. 118 (Ariz.); **U. S. v. Malcolm**, 282 U. S. 792 (Cal.).

sions of Texas which induced this Court to make that holding, but Appellants' disregard of, and veiled attack upon the principles decided in *Hopkins v. Bacon*, make it appropriate so to do.

From the beginning, the Texas community property system has been entirely constitutional and statutory.[20] It is in no sense a voluntary or consensual system.[21] Its effect and operation cannot be altered or avoided either by ante-nuptial or post-nuptial agreements. For so long as the marriage exists, community property cannot be partitioned.[22]

The Texas community property marital system is analogous to a common-law partnership.[23] Accordingly, it is definitely established that neither spouse acquires title to his or her share of community property through, or by gift from, the other. The rule was aptly expressed by the Supreme Court of Texas in *Burnham v. Hardy Oil Company*, 108 Texas 555, at page 564:

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[20]The Texas constitutional and statutory provisions are set out in Appendix "C", pp. 114-130, infra.

[21]Cf. **Commissioner v. Harmon**, 323 U. S. 44.

[22]**McDonald v. Stevenson** (Tex. Civ. App.), 245 S. W. 777 (Writ denied); **Bruce v. Permian Royalty Company No. 2** (Texas Civ. App.) 186 S. W. 2d 686. (Writ denied).

[23]"The powers of partners, or trustees of a spendthrift trust, furnish apt analogies." **Poe v. Seaborn**, 282 U. S. 101, 112.

In **Bender v. Pfaff**, 282 U. S. 127, at page 132, this Court terms the community relationship "a marital partnership." Many Texas decisions use the same terminology. See cases cited in foot-note 15 p. 21, supra.

"In this State the beneficial interests of the husband and wife in community property are equal, whether the grant or deed to the property be in the name of only one of them or to them jointly. Though the grant or deed be in the name of the husband alone, the 'interest' or 'estate' of the wife in the property is as absolute as that of the husband. *She acquires her interest in virtue of our law governing community property*, and the force which that law imparts to a conveyance of the property to the husband during the marriage. She takes under a grant or deed in his name to the same extent that he does; and it is as fully through the grant as is true of his interest, that she is invested with her right." (Emphasis supplied).

It is because of this principle and the partnership analogy that the wife is actually a party to all litigation respecting community property, although brought by or against the husband alone, and is bound by any judgment rendered in such proceeding, and is precluded from testifying in any such proceeding to the same extent that the husband is precluded.[24]

All community property is liable for the debts and torts of each spouse, except to the extent that, in carrying out its social policy, Texas has limited that

[24]**Starr v. Schoellkopf Co., 131 Tex. 263, 113 S. W. 2d 1227.** The rule here is much the same as in an action against an ordinary partnership. **20 Ruling Case Law, pp. 924-925, Sec. 139 "Partnerships."** See, as to the wife's preclusion from testifying when the husband is precluded, **Simpson v. Brotherton, 62 Tex. 170; Gilder v. City of Brenham, 67 Tex. 345.**

ability or the contractual capacity of either spouse.[25] he general rule is that all community property is able for all prenuptial obligations or torts of either pouse.[26] Some community property cannot be reach- l for the husband's obligations, whether they be pre post-nuptial.[27] The homestead, whether it be com- unity or separate, can be reached only for taxes ue on that property, and liens created in a specific anner for its purchase or improvement.[28] Except the extent that the Constitution forbids with re- pect to the homestead, the Legislature is entirely ee to shift as it sees fit the rules relating to the ability of community property for the obligations torts of either spouse.[29]

[25]Limitations on the wife's contractual power are to pro- ct her and her property, not to deprive her of it. **Red River ational Bank v. Ferguson, 109 Tex. 287.**

[26]**Article 4620 Texas Civil Statutes,** Appendix "C", p. 124, fra; **Portis v. Parker, 22 Tex. 699; Taylor v. Murphy, 50 x. 291; Lee v. Henderson, 75 Tex. 190; Patterson & Wallace Frazer, 93 S. W. 146.**

[27]**Article 4616 Texas Civil Statutes,** Appendix "C", p. 121, fra.

[28]**Article XVI, Sections 50, 51 Constitution of the State of exas.**

[29]"The Legislature, in defining the wife's rights in and to r separate property and property held in common with her sband, could lawfully deprive the husband of the power anted him for many years to manage and control the wife's parate property and portions of the community which ere derived from the use of the wife's separate property from her personal exertions, and could confine the man- ement, control and disposition thereof to the wife alone d could exempt, not only her separate property, but said rtions of the community from payment of the husband's bts." **Arnold v. Leonard, 114 Texas, 535, 547.**

At present the control of community property is divided between the spouses. The wife controls the revenues from her separate property.[30] The husband controls the revenues from his separate property,[31] his earnings, and community property derived from most other sources.[32] The homestead, whether community or separate, cannot be disposed of or encumbered except by the joint action of both spouses.[33] From the beginning, by force of the partnership analogy, and now to a considerable extent by force of specific statutes, the control of all community property, however derived, will vest completely in the husband or wife if either the husband or wife becomes incapacitated, is imprisoned or abandons the other.[34] As is true with respect to liability for debts, the Legislature is fully empowered to change the statutory rules regulating the control of either community or separate property. Such changes have been made on several occasions, and have always been upheld as valid.[35] In short, this Court and the Texas Su-

[30]**Hawkins v. Britton State Bank**, 122 Texas 69; 52 S. W. 2d 243.

[31]**Article 4613, Texas Civil Statutes**, Appendix "C", p. 120, infra.

[32]**Article 4619, Texas Civil Statutes**, Appendix "C", p. 122, infra.

[33]**Article 4618, Texas Civil Statutes**, Appendix "C", p. 122, infra. See also **Texas constitutional provisions** cited in footnote 28, supra, p. 29, supra.

[34]**Articles 3662, 3663, 3678, 3682 and 4619, Texas Civil Statutes**, Appendix "C", pp. 116, 117, 119, 120, 122, infra; **Wright v. Hays' Adm'r.**, 10 Tex. 130; **Zimpelman v. Robb**, 53 Tex. 274.

[35]**Arnold v. Leonard**, 114 Tex. 535; 273 S. W. 799; **Hawkins v. Britton State Bank**, 122 Tex. 69; 52 S. W. 2d 243 (Tex.

preme Court recognize that the power to control property is not a necessary incident to ownership.[36] The rule could hardly be otherwise, else no minor or incompetent could own property.

Wherever the control of community property may be placed, the spouse exercising it must exercise it as the representative and trustee of the marital partnership.[37] As this Court recognized, "in one way or another" the non-managing spouse is protected from the mismanagement of the managing spouse.[38] This rule has been applied in a variety of circum-

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Com. App.). This rule has been upheld and applied by this Court in cases arising in other community property states, and, in so doing, the Court recognized that control of community property could be shifted without divesting either spouse of property in the constitutional sense. **Warburton v. White**, 176 U. S. 484; **Arnett v. Reade**, 220 U. S. 311.

[36] See footnote 35, p. 30, supra.

[37] "* * * Statutes empowering the husband to manage the wife's separate lands and community assets made the husband essentially a trustee, accountable as such to the separate estate of the wife, or to the community." **Arnold v. Leonard**, 114 Tex. 535; **Edrington v. Mayfield**, 5 Tex. 363 to 368; **Speer's Law of Marital Rights in Texas**, Section 296; **Richardson v. Hutchins**, 68 Tex. 81; 3 S. W. 276; **Dority v. Dority**, 96 Tex. 215, 224 to 226, 60 L. R. A. 941, 71 S. W. 950; **Waggoner Bank & Trust Co. v. Warren**, 111 Tex. 318, 322, 234 S. W. 387.

[38] **Arnett v. Reade**, 220 U. S. 311, "These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts." **Hopkins v. Bacon**, 282 U. S. 122, 126; **Stramler v. Coe**, 15 Tex. 211; **Martin v. Moran**, 11 Tex. Civ. App. 509, 32 S. W. 904; **Watson v. Harris**, 61 Tex. Civ. App. 263, 130 S. W. 237; **Davis v. Davis** (Tex. Civ. App.) 186 S. W. 775.

stances. A commonplace one is where community property is used to improve or to discharge a lien on the separate property of one spouse. Here, equitable reimbursement is required.[39] Excessive or capricious donations are void.[40] This Court expressly recognized these rulings in *Hopkins v. Bacon*, supra, and there has been no change in them since that decision.

Upon the institution of a divorce proceeding, the authority of the husband to contract debts on account of the community, or to dispose of community lands, terminates.[41] If the wife is not otherwise provided for, alimony, pendente lite, may be awarded the wife,[42] but there is no obligation resting upon the husband to support the wife after divorce, and permanent alimony cannot be awarded.[43] If partition of community property is not sought in a divorce pro-

[39]**Dakan v. Dakan,** 125 Tex. 305, 83 S. W. 2d 620, summarizes Texas rules in this respect.

[40]**Stramler v. Coe,** 15 Texas 211. Fraudulent result, not intent, is the test. **Martin v. McAllister,** 94 Tex. 567. "The statutes empowering the husband to manage the wife's separate lands and community assets make the husband essentially a trustee, accountable as such to the separate estate of the wife, or to the community." **Arnold v. Leonard,** 114 Tex. 535; **Watson v. Harris,** 130 S. W. 237; **Coss v. Coss,** 207 S. W. 127. The wife's community interest is protected under the statute which makes void any conveyance to defraud creditors "or other persons of or from what they are, or may be, lawfully entitled to * * *" **Article 3996, Texas Stats., L. Bicocchi v. The Casey-Swasey Co.,** 91 Tex. 259.

[41]**Article 4634, Tex. Civ. Stats.,** Appendix "C", p. 129, infra.

[42]**Article 4637, Tex. Civ. Stats.,** Appendix "C", p. 129, infra.

[43]**Bond v. Bond,** 90 S. W. 1128.

ceeding, the spouses, after divorce, own all community property, however derived, as tenants in common, and have all of the rights to manage, sell and enforce partition of such jointly-owned property that ordinarily go with such tenancies." If in the divorce proceeding partition and division of property is sought, the Court awarding the divorce may make such division of the property of either spouse, whether that property be community or separate, as the equities of the situation may require, except that neither as to community nor separate lands can the Court divest a husband or wife of his or her title thereto."

Upon the death of either spouse intestate, his or her equal share of all community property, however acquired, descends to his or her children or their descendants, whether those children or their descendants be of that marriage or another, and only if there be no children or their descendants does the survivor inherit the decedent's share of the commun-

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"Hacker v. Hacker, 4 S. W. 2d 218; Williamson v. Gore, 73 S. W. 563; Freeman v. Pierce, 250 S. W. 778; Kirkwood v. Domnau, 80 Tex. 645; Womack v. Womack, 142 Tex. 299, 172 S. W. 2d 307.

"Art. 4638, Tex. Civ. Stats., Appendix "C", p. 130, infra. Hedtke v. Hedtke, 112 Tex. 404; Jeter v. Jeter, 281 S. W. 598; Fitts v. Fitts, 14 Tex. 443; Trimble v. Trimble, 15 Tex. 19; Long v. Long, 69 S. W. 428; Helm v. Helm, 291 S. W. 648; Hughes v. Hughes, 259 S. W. 180. Our search reveals no case in which the wife was awarded less than one-half of the community property. The husband's financial misconduct has been made the basis for awarding the wife more than one-half of the community property. Scannell v. Scannell, 117 S. W. 2d 538.

ity property.[46] Each spouse has full power of testamentary disposition over his or her share of community property, and, so long as there is testamentary capacity, can dispose of that full share by will to whomsoever such spouse sees fit.[47] Upon the death of either spouse an inheritance tax is levied by the State of Texas upon the one-half of the community property which passes at that spouse's death.[48] The Federal Government has always followed the same principle, and thus, on innumerable occasions, has collected from a decedent wife's estate an estate tax, even though the surviving husband inherited or was bequeathed the wife's full share of the community property.[49].

Consistent with the partnership analogy, the surviving spouse, without administration or court authorization of any kind, may dispose of community property for the purpose of paying community debts.[50] A surviving spouse can qualify as commun-

[46]**Art. 2578, Tex. Civ. Stats.**, Appendix "C", p. 114, infra. And even the wife's illegitimate child will inherit her share of the community property, to the entire exclusion of the lawful husband, if she dies intestate. **Art. 2582, Tex. Civ. Stats.**, Appendix "C", p. 114, infra.

[47]**Art. 8281, Tex. Civ. Stats. Brown v. Pridgen**, 56 Tex. 124. **Moss v. Helsley**, 60 Tex. 426; **Rogers v. Trevathan**, 67 Tex. 406.

[48]**Jones v. State**, 5 S. W. 2d 973; **Hansen v. Blackmon**, 169 S. W. 2d 955 (Ct. Civ. App.), aff'd. 140 Tex. 536; 169 S. W. 2d 962.

[49]See ruling cited at footnote 7 p. 17, supra.

[50]**Davis v. Magnolia Petroleum Company**, 134 Tex. 201, 134 S. W. 2d 1042; **Shell Oil Company v. Howth**, 138 Tex. 357, 159 S. W. 2d 483, 493.

ity survivor under the special statutory provisions relating to such qualification, and thereafter manage the entire community estate free of all judicial supervision. In the ordinary administration under the jurisdiction of the Probate Court, the survivor can at any time secure a distribution of his or her share of the community by giving bond to secure the payment of one-half of the community debts.[51]

There is nothing in the Appellants' discussion of the Texas community property system (pp. 6 to 14, Texas Brief) which contradicts the principles just summarized, or which should cause this Court to revise the holding made as to the nature of the wife's interest in community property in *Hopkins v. Bacon*, supra. Appellant's discussion consists primarily of incomplete statements and quotations extracted from the factual background necessary to their proper understanding and application. Many of the cases do not support the points for which they are cited. All of this, we believe, renders it appropriate, if not necessary, for us to digest all Appellant's Texas citations to show the factual situation in each and the precise holding. Due to the necessary length of this digest, it is incorporated in an Appendix to this brief.[52] Basically, the Appellants seek to spell out of limitations upon the wife's contractual capacity and the husband's authority as manager or trustee for the community partnership, a situation in which, during marriage, the husband is free to handle com-

[51]Arts. 3627, 3628, 3629, 3630, 3661-3683 Tex. Civ. Stats., Appendix "C", pp. 115-120, infra.

[52]See Appendix "D", p. 131, infra.

munity property in total disregard of the wife's rights therein. From this Appellant draws the conclusion that the wife's ownership is not equal to her husband's. Appellant's cases (See Appendix "D", p. 131, infra) will support no such conclusion. Indeed, this conclusion is directly opposed to the holdings of The Supreme Court of Texas, as well as those of this Court.

In *Red River National Bank v. Ferguson*, 109 Tex. 287, the Court, in holding that limitations on the wife's contractual power are to protect her and her property, not to deprive her of it, said (p. 291):

> "If her powers have been restricted, her property, at least, has been safeguarded. The limitations upon her authority are but the expression of a scrupulous concern for the preservation of her estate, and were imposed to that end. In that interest her authority to contract debts at all was confined to those essentially to her advantage, that is, for necessaries for herself or her children and the benefit of her estate, with a court, in all suits against her for such debts, charged with the duty of seeing that they were actually incurred for those purposes and were reasonable and proper."

In 1900, in *Warburton v. White*, 176 U. S. 484 (Opinion by Mr. Justice White), and again in 1911 in *Arnett v. Reade*, 220 U. S. 311 (Opinion by Mr. Justice Holmes), this Court recognized that the husband's control of community property was "not because he was the exclusive owner, but because by law he was created the agent of the community." In the

atter case, this Court dealt with the argument that he husband could defeat the wife's rights. There it vas said:

> "For it is conceded by the Court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

In *Hopkins v. Bacon*, 282 U. S. 122, this Court said, as to Texas community property:

> "These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts."

Further, in this case, the Court said:

> "* * the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband, **"

How, then, can the Government assert (Texas Brief, p. 6, citing a case not remotely in point) that,

> "The Texas wife's interest in the community property consists chiefly of the right to receive a portion of the property in existence at the time of dissolution of the community."

If the remarkably close analogy between the marital partnership and the ordinary business partnership with a managing partner is borne in mind,[53] the very

[53] Cf. **Poe v. Seaborn,** and other community income tax cases, supra.

limited significance of the statements made in the Appellant's brief will be emphasized. Debts created by a managing partner on behalf of the partnership can be satisfied out of partnership property; in order to reach partnership property for a partnership debt all members of the partnership are not necessary parties to the suit; bona fide transactions by a managing partner bind the partnership property and its members; the partner to whom management is not given cannot at will interfere with the manager's fairly-exercised discretion. These are principles which require no citation of authorities. They have always been recognized in the law of partnership without any suggestion that the non-managing partner was deprived thereby of full ownership of his or her share of the partnership property.

An examination of the authorities will not support Appellants' statement that the husband can make unrestricted gifts or expenditures of community property, or that an intent to defraud the wife is necessary in order for her to obtain judicial relief from action which actually defrauds her. It is the result rather than the intent which affords the remedy.[54]

[54]The wife's remedy for conduct in fraud of her property rights depends upon the necessities of the case. **Dority v. Dority, 96 Tex. 215.** It is clear from the rules applied where community property is used to improve separate property, or to purchase insurance, that the wife need not establish malicious or fraudulent intent in order to protect her rights. **Dakan v. Dakan, 125 Tex. 305, 83 S. W. 2d 620; Colden v. Alexander, 141 Tex. 134, 171 S. W. 2d 328; Martin v. Moran, 32 S. W. 904; Womack v. Womack, 142 Tex. 299, 172 S. W. 2d 307.** Excessive or capricious donations are void and the wife is entitled to her remedy against her husband or third

Nor is there basis for Appellants' assertion (in their exas brief, p. 13) that the rights of a wife "rest upon fictional basis, for they do not depend upon an actual scharge of the marital duties." The wife's rights ring from the fact of marriage, and are by virtue the law of Texas. Neither is a fiction. Recogniz- g the fact that in the great majority of cases mar- ed persons perform their duties, the courts of Texas ill not, generally, as a matter of Texas policy, sit determine the relative value of the spouses' activi- es, or measure their shortcomings. Here, again, the artnership analogy is helpful. Rarely, if ever, will partner's interest in partnership property or profits forfeited for failure to perform partnership duties rior to dissolution, and the general rule is that con- oversies between the partners will be heard and the quities between them adjusted only upon dissolution

ssessors. **Stramler v. Coe,** 15 Tex. 211. The remedies of junction or receivership are available to her. **Coss v. Coss,** 7 S. W. 127; **Vercelli v. Provenzano,** 28 S. W. 2d 316. It not necessary for the wife to seek a divorce in order to nforce these rights. **Dority v. Dority, 96 Tex. 215.** She n sue her husband and others to cancel deeds. **Mahoney v. nyder,** 93 S. W. 2d 1219. Upon abandonment the wife can anage all community property. **Zimpelman v. Robb, 53 Tex.** 4. She can sue alone when abandoned to recover community roperty. **Savage Oil Co. v. Johnson, 141 S. W. 2d 994; Ulmer John Hancock Mutual Life Insurance Company,** 161 S. W. 862. The husband in managing is bound to use good faith. e is essentially a Trustee. **Wright v. Hays' Adm'r,** 10 Tex. 0; **McMurray v. McMurray,** 67 Tex. 665; **Keller v. Keller,** 141 W. 2d 308; **Arnold v. Leonard,** 114 Tex. 535. An important feguard for the wife's rights is the power of the Court to do uity in partitioning community property upon divorce. See otnote 45, p. 33, supra.

of the partnership.[55] These very principles are applicable to Texas community property.

So, we submit, that this Court correctly held in *Hopkins v. Bacon, supra*, that Texas spouses equally own all community property.

(c) PREVIOUS SYSTEM BASED ON OWNERSHIP FAIR. AMENDMENT PRODUCES DISCRMINATION.

The principles heretofore established dispose of the charge of preferential treatment. They show that the spouses in Texas are at all times during marriage the equal owners of all community property; that neither acquires from the other donatively; and that neither has testamentary power over the other's share, or a right of survivorship with respect thereto.

This reduces the charge that prior to the 1942 Amendments there was discrimination and preferential treatment in favor of Texas spouses to the proposition that it is discriminatory to measure an estate tax only by the property which the decedent owned at death. Regardless of the source from which these charges emanate,[56] we respectfully but earnestly deny that the previous system was discriminatory,

[55]**Texas Jurisprudence** Vol. 32, para. 55, p. 305. "Partnership"; **American Jurisprudence** Vol. 40, para. 119, pp. 212-213. "Partnership."

[56]All such charges, even those made in the dissenting opinion in **Commissioner v. Harmon**, 323 U. S. 44, are predicated upon the erroneous assumption that the wife's ownership was fictional—an "as if" ownership—rather than an ownership which this Court held was protected by the Federal Constitution. **Arnett v. Reade**, 220 U. S. 311; **Warburton v. White**, 176 U. S. 484. Cf. **Arnold v. Leonard**, 114 Texas, 535.

and confidently assert that the 1942 Amendments create, rather than prevent, discrimination.

Everywhere, before the 1942 Amendments, and now everywhere but in community property states, the basic element in measuring the estate tax was and is the property owned by the decedent at death. That ownership was everywhere, prior to 1942, determined exclusively by state law. This Court has held that taxes are usually, if not necessarily, based upon ownership.[57] The application of this usual, and, we believe, necessary, basis for determining tax liability, conclusively rebuts any charge of preference or discrimination. Likewise, the mere fact that A, owning more property than B, is taxed more or at a higher rate, has never been held to produce discrimination; nor even a leak in the revenue.[58]

In last analysis, all the charges of discrimination and preferential treatment with respect to community property must be based upon the fact that Texas has a different marital property system than have certain other States, and assume that Texas citizens should be taxed as if they had lived and accumulated under a different property system than that which actually governs them. These charges imply that there is in existence in other States a marital property system favored by the Federal Constitution, and that

[57] **Home Savings Bank v. Des Moines**, 205 U. S. 503. "With respect to taxation, usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon the property which they own, not upon the property which others own."

[58] **Knowlton v. Moore**, 178 U. S. 41; **Brushaber v. Union Pacific Railroad Company**, 240 U. S. 1.

citizens of community property states, if they do not elect to conform to such a system, should be taxed as if they did. Of course, there is no federally-favored marital property system, and no branch of the Federal Government has any authority to alter a state marital property system.[59] Nor has any branch of the Federal Government power to prevent a State from altering its marital property system as it sees fit, provided only no pre-existing property rights are destroyed thereby.[60]

Exercising their clear rights so to do, all States, other than community property states, have heretofore abandoned the common law marital system, and have adopted more enlightened and progressive systems of their own choosing. Each and every departure or change which these States made from the old common law system materially increased the wife's property rights and materially decreased the husband's property rights. This necessarily increased the estate of which the wife, living under such a system, would die possessed, and decreased the estate of which the husband would die possessed. Having so exercised their right to change, these States naturally and properly insist that these changes be recognized in the imposition of federal estate taxes, and this has always been done. But, with striking inconsistency, these States and their spokesmen seek to deny to the community property states which have always had an even more enlightened and progressive marital property system, similar recognition of the actuality of their system.

[59] **Ohio v. Agler**, 280 U. S. 379.

[60] **Arnett v. Reade**, supra; **Warburton v. White**, supra.

To deny recognition of ownership of community property in the imposition of federal estate taxes involves, therefore, a denial of exactly the same principle which would be denied if Congress attempted to include in the husband's estate in a non-community property state, property representing the wife's earnings of which state laws give her the most complete control and ownership. If failure to tax the wife's property as a part of the husband's estate produces discrimination or causes a leak in the revenue when applied to community property, the corresponding failure to include part or all of the wife's separate property in the husband's gross estate in non-community property states, produces exactly the same sort of discrimination and leak in revenue.

It is not at all unusual for state law to affect materially the extent of the property accumulations of citizens and residents of such state. Local tax laws, local labor laws—all restrictive laws regarding business—necessarily reduce acccumulations. But he would be bold indeed, who would assert that the recognition of the practical effect of these laws in the imposition of federal taxes is discriminatory or preferential. If, then, state policy can, either for its own revenues or for the protection of employees or the public, reduce a citizen's accumulations, and thereby reduce his estate taxes; wherein lies inequality or discrimination in awarding to the marital partner her fair share of marital gain, and similarly recognizing this award in the imposition of federal taxes? In each case the federal tax law, properly and fairly applied, will reach the property which the local juris-

diction permits its citizens to accumulate. It will not reach the property actually belonging to another, even though, had the decedent lived and had his business activites under the laws of another jurisdiction more favorable to him (and we believe much more unfair to the wife), he might have owned more property.

Finally, no one charging discrimination in favor of community property states has ever dwelt at length upon the burdens borne by citizens of those states. When the Texas wife predeceases her husband, an estate tax is levied upon her share of the community property as well as on her separate estate, and this no matter how the community property has been acquired. In non-community property states, this tax would be imposed only upon the separate property of the decedent wife. Critics have never emphasized the economic burdens and the disadvantages imposed upon the husband in a community property state by a law which vests his wife with equal ownership of all community acquisitions.[61] They have never pointed to the fact that when community property ownership is recognized, no property escapes taxation, but each decedent is taxed upon what he or she owns.

The 1942 Amendments, far from eliminating discrimination, have produced the most grevious sort of discrimination against taxpayers in the community

[61] In **Vernier's American Family Laws**, Volume 3, page 227, it is stated: "One of the serious disadvantages incident to the community-property system is the disruption of the husband's business activities caused by the wife's death. The husband may have spent years in building a successful enterprise and find it suddenly broken up by the untimely death of his spouse and the interference of her heirs or devisees."

property states. These discriminatory characteristics will be dealt with in detail when we discuss the constitutional issues, pages 70 to 79, infra. It is sufficient to indicate here that discrimination will necessarily result when property rights are disregarded in some states, and there are substituted for established and proven property laws wholly novel and nebulous concepts of economic attribution or managerial control, particularly when the framework of the basic statute is not adjusted to receive such concepts. As we will show hereafter, such specialized treatment will doubly tax much community property and will confiscate many estates by including the survivor's gross, rather than net, share in the decedent's taxable estate.

Congress wittingly, or otherwise, has established for the community property states an estate tax system which will very materially increase the total tax burden imposed with respect to the death of both spouses over what it would be with respect to the same amount of property acquired under identical circumstances in other states.[61a]

[61a] This is because community property is taxed on the death of the two spouses at 150% of its value. The first to die is taxed on all, including the surviving spouse's one-half, and the survivor's one-half is taxed again whether he or she dies five or twenty years later. In other states a husband may leave accumulations to the children, or to his wife for life with remainder over. In either case, no second tax is laid at the surviving wife's death. But in Texas there is no escape from the second tax because the husband may not dispose of his wife's interest at his death, though he be taxed thereon. The result is that 100% of the value is taxed in New York, but 150% of the value in Texas on the death of the two spouses.

In short, the system of federal estate taxation in existence prior to the 1942 Amendments was not discriminatory, because everywhere it was based upon property owned by the decedent, and that ownership was determined by state law. We approach, then, the constitutional questions in the light of the fact that in this case there was imposed upon the decedent's estate a tax measured by property which the decedent did not own at death, over which he had no power of testamentary disposition, and which he had never owned during life; that this measure of the gross estate is applied only in Texas, and the other community property states, and that its use produces, rather than prevents, preferential treatment.

II.

Section 811(e)(2) of the Code Violates The Due Process Clause of the Fifth Amendment.

(a) THE STATUTE MEASURES THE TAX BY THE PROPERTY OF ANOTHER.

The 1942 Amendment, in measuring the decedent's estate tax by the value of the surviving wife's interest in the community property, clearly offend the Due Process Clause of the Fifth Amendment. This Court has repeatedly held that to tax A with reference to B's property amounts to confiscation, and is a taking of property without due process of law, in violation of the Fifth Amendment.

In the early case of *Hartman v. Greenhow*, 102 U. S. 672, this Court said (p. 684):

> "***** And surely it is not necessary to argue that an act which requires the holder of one con-

tract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

Somewhat later the same view was indicated in *Knowlton v. Moore*, 178 U. S. 41, in the following way:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound *inequality* which we have noticed, would not transcend the limitations arising from those fundamental conceptions of *free government* which underlie all constitutional systems." (Emphasis supplied).

Directly in point, since federal power is restricted by the Due Process Clause of the Fifth Amendment to the same extent that the Due Process Clause of the Fourteenth Amendment restricts state power, is the decision in *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206. There this Court held lacking in due process a Wisconsin statute which taxed the husband upon the combined income of himself and wife. The essence of this Court's holding in that case is:

> "Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has pow-

er by an income tax law to measure his tax, not by his own income, but, in part, by that of another.******

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare Nichols v. Collidge, 274 U. S. 531, 540."

In law and in fact, the wife's share of community property is hers, and in no sense that of her husband, in just the same way, to the same extent, and for the same reason that the wife's income included in the measure of the tax in the *Hoeper* case was hers. The Wisconsin wife, in the *Hoeper* case, owned income because Wisconsin had abandoned the common law rule by which "the wife's property, owned at the date of marriage or in any manner acquired thereafter, is the property of her husband" and by which "her earnings and income are his, he may dispose of them at will, and he is liable for her debts." The Texas wife owns one-half of the community property because Texas never adopted the common law as to marital property, but, from the beginning, had a policy and law which invested the wife with equal ownership of all marital gains.[62] This interest demands the

[62]As heretofore pointed out, the practical effect in both cases is to diminish the taxable estate of the husband.

same protection under the Due Process Clause of the Constitution as does the separate estate created at a much later date by the statutes of Wisconsin for the benefit of wives resident there.[1] The correctness of this view is emphasized by Mr. Justice Holmes' dissenting opinion, which was premised upon the assumption that since the State could abandon its statutory system of marital property law and go back to the common law for all purposes, there was no impediment to its right so to do for tax purposes. What the State of Wisconsin could do with respect to its own marital property system has no bearing at all upon the power of the Federal Government to change one element or attribute of a State's marital property system.

When the *Hoeper* case was decided this Court had applied the same principle in striking down a federal estate tax law in *Nichols v. Coolidge*, 274 U. S. 531. There the Court held that the mere desire to equalize taxation could not justify a burden on something not within congressional power; that it was unlawful to measure an estate tax, directly or indirectly, by the property of another, even though it had been given to such other by the decedent in his lifetime. The Court also pointed out that, while Congress undoubtedly might require that property transferred in contemplation of death be treated as part of the estate for purposes of taxation, this was necessary to prevent evasion and give practical effect to the exercise of admitted power. But the right so to tax was limited by the necessity. The Court concluded that the

[1] See footnote 16, pp. 22, 23, supra.

tax was arbitrary and capricious, and amounted to confiscation, and therefore violated the Due Process Clause of the Fifth Amendment.

The case at bar presents a more arbitrary, whimsical and confiscatory enactment than did the statute held invalid in the *Coolidge* case. The tax there was supported, to some extent, by the admitted fact that the property included in the decedent's gross estate had at one time belonged entirely to the decedent and had been disposed of by her donatively to the natural objects of her bounty, and that she retained a life income with respect to such property. There was, then, some room for the argument that the imposition was necessary in order to avoid lifetime dispositions of property which would render ineffective the federal estate tax. But no such saving element is present in the case at bar. There was no donation by Herbst to his wife of an interest in the community property. The decedent did not reserve, nor could he have reserved, unto himself any interest in her share of the community property. The imposition here is simply and only a deliberate, indefensible attempt to tax the property of one to another.

This Court applied much the same principles to strike down that portion of the Revenue Act of 1926 which established a conclusive presumption that property donatively transferred by a decedent within two years of his death was transferred in contemplation of death. The case is *Heiner v. Donnan*, 285 U. S. 312. That case reached this Court upon certified questions, which included one as to whether this pro-

vision violated the Due Process Clause of the Fifth Amendment. The Court first made an illuminating analysis of the Act as a whole, stating:

> "Section 301 (a) of the Revenue Act of 1926 * * * * imposes a tax 'upon the transfer of the net estate of every decedent,' etc. There can be no doubt as to the meaning of this language. The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts inter vivos. The tax rests, in essence, 'upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. * * * * It is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' Knowlton v. Moore, 178 U. S. 41, 56, 57 * * * *. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. Milliken v. United States, 283 U. S. 15, 23, * * * *. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (Bromley v. McCaughn, 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The 'generating source' of such a gift is to be found in the facts of life and not in the circumstances of death. And the death afterward of the donor in no way changes the situation; that is to say,

> the death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, * * * *; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. * * * * Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other in consequence of the death which happens afterward."

The Court then went on to hold that the statutory provision was invalid, relying primarily upon *Schlesinger v. Wisconsin*, 270 U. S. 230, and *Hoeper v. Tax Commission*, 284 U. S. 206. It was said in this connection:

> "Nor is it material that the Fourteenth Amendment was involved in the Schlesinger case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge v. Long, 282 U. S. 582, 596 * * * *. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. * * * *
>
> "* * * * The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on

A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation. 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property.' United States v. Baltimore & Ohio R. Co., 17 Wall. 322, 326."

It is unnecessary in this connection to determine who will bear the burdens of this tax.[64] The tax will be borne either (1) wholly by the decedent's estate,

[64]Not least among the objections to the 1942 Amendments is the vagueness and uncertainty respecting the question of who ultimately bears the burden of the tax. Appellants (in their Louisiana Brief, Page 49) state that if the question were one of Federal law alone, it seems that the weight of the Federal tax would be borne equally by the surviving spouse and the decedent's estate, but suggest that the problem is one which the States should themselves decide. Had Congress intended the decedent's executors to charge the surviving spouse with any part of the tax, special provision would have been made, such as was made in the case of life insurance payable to named beneficiaries. See Section 826(c), I. R. C., Appendix "A", Page 104, infra. Moreover, prior to the 1942 Amendments, a decedent's estate tax was always classified and treated as a separate, not a community, obligation. It is difficult to see how expanding the measure of the tax can convert a separate obligation into a community obligation to be satisfied to any extent out of the surviving wife's share of the community property. Furthermore, it may be noted that the local revenue agents in charge, apparently on instructions from Washington, regard the tax as a liability exclusively of the decedent's estate and have taken the position that, if the survivor pays any part of the estate tax, such payment constitutes a taxable gift.

or (2) proportionately by the decedent's estate and the surviving spouse. The difference is one of degree. The requirements of due process would be violated in either instance. In either case, the tax is measured by another's property. If the tax is borne entirely by the decedent's estate, it would in many cases result in complete confiscation.[65] If the tax is to be apportioned, the monetary burden on the decedent's estate is less but it is, nonetheless, a tax on A measured by B's property under the authorities heretofore discussed.[66]

(b) HUSBAND'S MANAGERIAL CONTROL CANNOT BE TAXED. TERMINATION OF THIS CONTROL AT HIS DEATH IS NOT A SHIFT OF ECONOMIC BENEFITS OR OF INTEREST IN PROPERTY.

The Appellants (Louisiana brief, pp. 21-22) seek to avoid the effect of the *Hoeper* and other cases discussed above, by contending that, conceding the surviving wife to be the owner of a full one-half interest in the community property, nevertheless upon the death of her husband advantages did occur which were sufficient to justify taxing her interest. As we have shown, Herbst's death did nothing more than terminate the management which he had once exercised over the community property for the benefit of

[65]The estate tax rates are graduated up to seventy-seven (77%) percent. The total tax will exceed one-half of an estate of $6,000,000 or more, so if the tax is measured by the entire community property it will, in many cases, exceed the decedent's one-half of the estate.

[66]In the event any part of the burden is borne by the surviving wife, it would appear to be based entirely upon ownership, and therefore invalid as a direct, unapportioned tax. **Pollock v. Farmers' Trust Loan Company**, 157 U. S. 429, 158 U. S. 601. See p. 84, infra.

himself and his wife. The essence of the Government's position, therefore, is that by losing the manager who had served his wife faithfully and advantageously for 41 years, the surviving wife was financially benefited enough to justify the imposition of a tax of several thousand dollars, either upon her manager's property or upon that property and her own. Stated otherwise, the Appellants' position is and must be that the death of the husband resulted in a shift of "economic benefit (s) of property" and ripened in the wife a "property right or interest" which could be subjected to a death tax.[67]

There are several answers. There is no basis in the statute or its history for the assertion that its applicability is dependent to the slightest extent upon whether or not a decedent spouse had control of the community property to be included in that decedent's gross estate. If Herbst had become incapacitated prior to his death, and had thereby lost the management of this property; this statute, if valid, would require that all of the wife's share of the community property be included in his gross estate. Similarly, had Mrs. Herbst predeceased her husband, the statute would have required that all their community property be included in her gross estate. This would be true despite the fact that management of the community property was already in her husband. Likewise, if state legislation had shifted the control of community property, the tax statute, if valid, would

[67]See quotation from **Heiner v. Donnan**, 285 U. S. 312, p. 51, supra.

be unaffected thereby and would still tax all community property to the first to die.[68] It is clear, therefore, that the Appellants throughout their briefs undertake to defend a statute which is not before the Court, and which Congress has not yet enacted.

Assuming, arguendo, that this statute can be construed as if its applicability depended upon a shift of management occasioned by death, it is nevertheless clear that such a construction would not save the statute under the Due Process Clause. Even when so construed, the wife's share of the community property would not pass at her husband's death. Nor would there be as to her share of the property a completion of a previously incomplete inter vivos transfer from him.

Under the decisions of this Court,[69] the inclusion of property in a decendent's gross estate is justified only when property rights are ripened in the survivor or there is a shifting to the survivor of economic benefits of property, such ripening or shifting being occasioned by the death of the decedent. Since a shifting of management is not the shifting of an economic benefit in property and since such shifting does not ripen in the survivor property rights of substantial value; there is no valid basis for making the shifting of management the occasion for the tax.

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[68]Certainly Congress did not intend that the incidence of the tax could be varied by natural causes, like incapacity, or by state legislative action.

[69]**Heiner v. Donnan, 285 U. S. 312; Whitney v. Tax Commission, 309 U. S. 530; Tyler v. United States, 281 U. S. 497; United States v. Jacobs, 306 U. S. 363.**

Without repeating what has heretofore been said (pp. 21-40, supra) about the nature of the husband's management of community property, it is obvious that this management is more properly classified as a duty rather than a right of value. Stripped of its social and sentimental aspects, the husband's situation is simply this: with no possibility of gain or compensation, he is charged with the duty of faithfully and diligently caring for the property of another as he would and does for his own. Even the control of a fiduciary who is compensated for his activities has been held by this Court not to constitute an economic interest in the property. *Reinecke v. Northern Trust Company*, 278 U. S. 339, where it is said:

> "Nor did the reserved powers of management of the trusts, save to the decedent (who had reserved these powers), any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made."

Thus the shift of economic interest is complete when a donative trust is created, although managerial powers are reserved by the donor. It is much more true in this case that the wife was the full and complete owner of her share of the community property prior to her husband's death, and his death ripened her no property rights and shifted to her no economic benefits.[70]

[70]The word "economic" refers to wealth or capital and the phrase "economic interest in property" must refer to a val-

This is further emphasized by the fact that prior to the 1942 Amendments, when the value of the wife's interest in community property was all that was included in her estate, she was taxed upon one-half of the full value of all community property without diminution because of the husband's managerial control.[71]

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uable interest or right in the property itself, as distinguished from mere management over the property for the account of someone else. At least equitable ownership by the one to whom the economic interest is attributed is a necessary part of this conception. This is made clear by the decisions of this Court in **Reinecke v. Northern Trust Company, supra,** and **Helvering v. Stuart,** 317 U. S. 154, both of which held that mere managerial control for someone else does not constitute an economic interest in property. In **Helvering v. O'Donnell,** 303 U. S. 370, this Court held that the phrase "economic interest," for the purposes of the depletion deduction, referred to "an interest in the properties themselves,"—"an equitable interest in the res." Surely if a right to a share of the net profits from the operation of a property does not constitute an "economic interest" therein (**Helvering v. O'Donnell, supra; Helvering v. Elbe Oil Land Development Company,** 303 U. S. 372), mere management powers for another's benefit will not constitute such an interest.

[71] If the power and duty of controlling community property is a valuable right, then this Court and the Supreme Court of Texas were entirely in error when they held that control could be shifted at the will of the Legislature without violating the requirements of due process. **Warburton v. White, supra; Arnold v. Leonard, supra.**

In **Warburton v. White** this Court said:

> "The Legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do so. Changing the manner of conveyance did not alter the status of ownership."

In **Arnold v. Leonard, supra,** the Supreme Court of Texas said:

Nor is the applicability of what has been said varied if we look alone to the wife's situation after her husband's death. The Appellants assert (Louisiana brief p. 33) that only upon the husband's death does the wife have full management, control and dispositive power over her share,of the community property. But this does not establish that control, management and dispositive power over property for the benefit of another is a property right.[72] It is as logical to

"The Legislature in defining the wife's rights in and to her separate property and property held in common with her husband, could lawfully deprive the husband of the power granted him for many years to manage and control the wife's separate property and portions of the community which were derived from use of the wife's separate property or from her personal exertions, and could confide the management control, and disposition thereof to the wife alone, and could exempt not only her separate property but said portions of the community from payment of the husband's debts * * *. But, the Legislature could not divest the husband of all interest in and to property which, under the Constitution, was guaranteed either to the community or to the husband's separate estate and use the same to enlarge the wife's separate estate beyond its constitutional limits."

The same view was expressed in **United States v. Goodyear**, 99 F. 2d 523 (C. C. A. 9), where the Court used the following language:

"The terms 'management and control' are not synonymous with 'possession and enjoyment.' That one may manage and control property without either possession or enjoyment is illustrated by the situation where an agent manages real property for the owner."

[72]If we are to be practical in tax matters, and we agree that we should be, how can the Appellants' assertion that widowhood produces economic advantages be reconciled with the

assert that when a guardian or trustee dies, he can be taxed on the bare termination of managerial control; or that a decedent minor or beneficiary could not be taxed upon the full value of his property because someone else had the right to control it.

Other illustrations certify to the correctness of this Court's decision in the *Reinecke* case, supra. If, for example, Texas restored to the husband the power which he once had to control the wife's separate property (property owned by her at marriage or thereafter acquired by gift, devise or descent), or if a non-community property state were to give the husband, not the ownership and complete control which he acquired at common law over his wife's separate property, but merely control thereof as her agent and representative, and for her account; would the termination of that control by his death justify and support the inclusion of such property in the husband's gross estate? Or, to carry the point for illustration further, suppose that a husband in Texas became insane, or was imprisoned, or abandoned his wife, the control over the community property thus passing to her; could a gift tax or any transfer tax be imposed at the time of such event? And would such an event cause a shifting of the incidence of the estate tax? Should the husband, in such a case, regain his sanity, return to his wife, or be pardoned;

statistics available at any Better Business Bureau which show to what extent widows are preyed upon and lose their property; or with the widespread practice of husbands leaving what they bequeath their wives in trust where, as a substitute for the business experience of the husband, the widow secures that of a competent trustee.

would a second gift tax be imposed upon the revesting in him of managerial control? Such taxes would not stand the test laid down by this Court in the *Hoeper* and similar cases.

Even if we concede arguendo that a cessation of managerial control can be made the justification for the tax, it is nevertheless clear that the 1942 Amendments are unconstitutional. Such justification could not possibly apply to the case of a wife predeceasing her husband. As we have shown, the community property here involved is that type of community property which is not derived originally from the separate property of either spouse. Nor is it derived originally from compensation for personal services rendered by either spouse. The property here in question is therefore the type of community property which is taxable in its entirety to Herbst at his death, and which would have been taxed in its entirety to Mrs. Herbst had she died first. Had Mrs. Herbst died first, there would have been no cessation of management. Prior to her death her husband would have had the control over the entire community, and following her death he, of course, would continue to exercise the control over his half interest. Her death would not have affected in any degree his interest in the community property. Yet, this statute clearly would have required at her death the same tax that was imposed here at Herbst's death.

The Appellants make no real attempt to justify the tax on the survivor's share of the community where the wife is the first to die. Their principal contention (Louisiana brief, pp. 51-53) is that a wife's case is not

before the Court, and that this Court may not consider this point. However, it is clearly necessary for this Court to consider the application of the statute to every typical case. Approximately one-half of the estate tax cases arising in the community property states will involve cases where the wife predeceased the husband. If the statute is unconstitutional as to those cases, it must fall altogether, for we may not presume that Congress intended it to apply only to approximately one-half of the cases to which the statute was addressed. Whether the statute is separable or not is a matter of congressional intent.[73] It is respectfully submitted that, considering the clear language of the statute, Congress did not intend, and could not have intended the statute to apply only to the case of a husband, and then only in those cases where the husband at his death had managerial control over the property.

The situation with which we are dealing is entirely different from the type of situation which has been so frequently before this Court, and which makes up the bulk of the Appellants' citations to this Court's decisions. We refer to those cases where the property taxed to the decedent was at one time his in every sense of the word, but he had made an incomplete transfer, retaining a reversion, testamentary power, or

[73]See **United States v. Reese**, 92 U. S. 214; **Butts v. M & M Transport Co.**, 230 U. S. 126, 134; **Pollock v. Farmers' Loan & Trust Co.**, 158 U. S. 601, 636. It is to be noted that the Revenue Act of 1942 contains no separability clause; but is it did, this would not be controlling. **Hill v. Wallace**, 259 U. S. 44.

something akin thereto. In such cases, death puts an end to those powers and then, for the first time, the donee becomes possessed of the property in the true sense of the word. This Court has never before considered an attempt to tax as part of a decedent's gross estate property which that decedent had never owned and over which he had no power testamentary in character, but of which he had merely managerial control. That is our situation, and what we have heretofore said, we respectfully submit, conclusively demonstrates that a shift of managerial control under such circumstances cannot validly be made the occasion of a tax measured by the value of the controlled property.

(c) THE STATUTE CANNOT BE JUSTIFIED BY THE TYLER, JACOBS, WHITNEY AND MOFFITT CASES.

There is nothing in *Tyler v. United States*, 281 U. S. 497, or in *United States v. Jacobs*, 306 U. S. 363, which militates against what we have heretofore said. It is idle to speculate, as the Appellants do (Louisiana brief pp. 36-37), in considering these decisions, on what the Court would have held had one or more of the elements expressly relied upon in those cases been absent. The Court was passing only upon the questions before it.

In its application to the survivor's moiety, each statute dealt with in these cases was limited to that portion which mediately or immediately came donatively from the decedent. We have no donative element here; no prior ownership of the survivor's moiety by the decedent.

Each of those cases dealt with a voluntary contractual as well as donative arrangement. Here we are dealing with a community property system which is in no sense contractual, consensual, or donative.

In both the *Tyler* and *Jacobs* cases there was present the "grand incident" of survivorship, without which there could be neither an estate by the entirety nor a joint tenancy. Neither party to either tenancy had power of testamentary disposition. Prior to the death of one tenant, neither was assured of full ownership of any part of the jointly-owned property. The death of one tenant destroyed all ownership in the decedent without compensating right of testamentary disposition. All of this is wholly unlike the situation with respect to Texas community property, where there is no survivorship, where there is full right of testamentary disposition, where the death of one does not forfeit his or her interest to the other, and where the surviving spouse takes nothing from the decedent, merely continuing to hold the property previously owned.

That the above accurately summarizes the basis for this Court's holding in these cases is shown, as the Court below very aptly pointed out (R. 22-25), by the following brief excerpts from these decisions. In the *Tyler* case this Court said:

> "To include in the gross estate, for the purpose of measuring the tax, the value of property, *no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other*, and which, as a consequence of the latter's death, was

> *relieved from restrictions imposed by the law in respect of tenancy by the entirety*, so as to produce in the survivor the right of sole proprietorship, is, obviously neither arbitrary nor capricious." (emphasis supplied).

Likewise, in the *Jacobs* case, the Court pointed out that the property was "traceable to the decedent." And, further, at page 368:

> "These circumstances, together with the fact, the existence of which the statute requires, that *no part of the property originally had belonged to the wife*, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate. * * * *" (emphasis supplied).

And on the same page the Court again adverted to the fact that "the decedent alone had furnished consideration for the joint property." This, and the "grand incident" of survivorship, the possibility of taking all in fee simple, were the controlling factors in the *Jacobs* case.

But, if it could be said that the Court would have reached the conclusion which it did reach in the *Tyler* and *Jacobs* cases, had either the donative or survivorship element been absent, neither case would support the Appellants here. For here we have neither donation nor the right of survivorship. Nor do we have the shift, or the completion of a shift, of any substantial property right. The wife loses, rather than gains, by being deprived of her husband's advice, counsel and services as to her one-half of the property.

The Appellants cannot draw comfort from *Whitney v. Tax Commission*, 309 U. S. 530, around which much of the Appellants' cases are built. Here, again the Court was deciding the case before it—an unusual one. Due to shifting from succession to estate taxes and statutory variations in the rule with respect to taxing powers of appointment to the donor or donee; it had happened that a very substantial part of a large estate had escaped taxation at the death of its owner, and, but for the legislation directly involved in the *Whitney* case, would have again escaped taxation when it passed to the next generation. The property involved had been left in trust at the death of Cornelius Vanderbilt, with the right in his widow to receive life income from the trust property, and with the power in her to appoint the corpus of the trust among certain of her children. She exercised this power. The amendment to the New York estate tax law provided that in such circumstances, (where the death of the donor of the power had occurred at a time when the property covered by the power was not included in the donor's estate nor taxed to the donee) the property should be included in the estate of the donee when the power was exercised in a testamentary manner. This Court upheld that tax as against the contention that it violated the Fourteenth Amendment, pointing out that under the circumstances Mrs. Vanderbilt's death brought about "a shift in economic interest in property," and that it was within the power of the Legislature to fasten on that shift as the occasion for the tax. The economic shift was this: Mrs. Vanderbilt throughout life en-

joyed income from the property. She had the power to dispose of it to and among the natural objects of her bounty, and to shift between them the amount of the trust corpus each would take. Here was a true shift of economic interest in property, dissimilar to what occurred with respect to Mrs. Herbst's share of the community property at her husband's death. Herbst had not theretofore had a right to enjoy the income from Mrs. Herbst's share of the property. He had no testamentary powers whatsoever with respect to that share. There had been no previous escape of this property from taxation, and the failure to include it in Herbst's estate would not have permitted it to go tax-free when it passed on to the next generation at Mrs. Herbst's death.

If we were to substitute for the actual facts in the *Whitney* case facts similar to those present in the case at bar, these substituted facts might be thus stated: Assume that Cornelius Vanderbilt had constituted his widow trustee of the property involved, with powers only of managerial control, with no right to the income from the property, and no testamentary power with respect thereto. Would even Appellants assert that under these facts this Court would have held that the death of Mrs. Vanderbilt and the termination of her managerial powers with respect to this property would have justified the inclusion of the trust property as a part of her gross estate, or have asserted that her death caused a shift of economic interest in the property? Further to illustrate: Assume that Cornelius Vanderbilt had left the property in trust with Mrs. Vanderbilt as trustee, had given her managerial powers over the whole, but

had limited her right to enjoy the income to one-half, and had likewise limited her testamentary powers (or substitutes therefor) to one-half of the corpus. Of course, this Court would have held that as to that one-half there was a shift of economic interest justifying the inclusion of that one-half in her gross estate. But any assertion that the *Whitney* case holds that the other one-half, over which Mrs. Vanderbilt had no power of testamentary disposition, the income of which she could not enjoy, could be included in her gross estate, is wholly without foundation; and will be until and unless this Court holds that the death of a pure trustee will warrant including in his gross estate all property controlled by him as such trustee, but economically and beneficially owned by the beneficiaries of the trust.

Nor is support for this tax to be found in *Moffitt v. Kelly*, 218 U. S. 400, affirming the decision of the Supreme Court of California, 95 Pac. 653, 1025. In that case, by will, Moffitt disposed of all of his estate to his wife and children in the same proportions as if he had died intestate. California levied an inheritance tax on all property passing by will or in the case of intestacy from any person who might die seized or possessed of the same. It was claimed that the rights, if any, which the laws of California then gave the wife were not subject to this tax. At that time, as this Court subsequently recognized in *United States v. Robbins*, 269 U. S. 315, and *United States v. Malcolm*, 282 U. S. 792, the wife's interest in community property fell far short of an equal undivided half interest in the community property.

She had no power of testamentary disposition over any part of the community property. The Supreme Court of California in the *Moffitt* case (95 Pac. 653, 1025), held that "the interest of the wife was a mere expectancy," and that "the wife did take her share of the community property upon the death of her husband by succession as his heir." The Supreme Court of California concluded that in view of this situation it was entirely competent for the Legislature to levy an inheritance tax measured by the interest passing to her at her husband's death. This Court, in affirming the decision of the Supreme Court of California, merely held that it was bound by the California Court's ruling as to the nature of the wife's interest under the law of that state; that the case presented only a matter of local law, and involved no federal question. This case is authority only for the proposition that "so long as the privilege of succession has not been fully exercised it may be reached by the tax."[74] This renders, we believe, entirely inaccurate the statement of footnote 40, page 44 (Appellants' Louisiana brief), that *Moffitt v. Kelly* "was decided upon the assumption that her (the wife's) interest was 'vested'." We are quite certain that in deciding the power of California under the Fourteenth Amendment to tax a succession, this Court did not assume that California law was different from what the Supreme Court of California had declared it to be in the very case which this Court was reviewing.

[74]**Chase National Bank v. U. S., 278 U. S. 327, 336, quoting from Saltonstall v. Saltonstall, 276 U. S. 260.**

(d) THE STATUTE CANNOT BE JUSTIFIED BY THE THEORY OF ECONOMIC ATTRIBUTION; IT CREATES ARBITRARY PRESUMPTIONS; IMPOSES AN IMPOSSIBLE BURDEN OF PROOF; IS RETROACTIVE AND OTHERWISE CAPRICIOUS, ARBITRARY AND CONFISCATORY.

The novel concept of economic attribution, advanced for the first time in the Committee Reports[75] and in the Appellants' Briefs (Louisiana Brief, Page 53), will not make the tax valid.

The Appellants have nowhere indicated what the correct meaning of this term is. If we assume that property is economically attributable to a person because that person's efforts produced the property, irrespective of whether rights of ownership attach to the property produced; then this theory would justify the taxation of a partner's estate upon all property in such sense economically attributable to him, though the right of his partners to share therein antedated his efforts and continued thenceforth. It might even justify the inclusion in the estate of a corporate executive of the corporation's property attributable to his efforts. If, on the other hand, the view is accepted that the meaning of "economic attribution"[76] is limited to property acquired by the one expending the effort, there are many instances in which the taxation of that property to such one would be invalid.

Thus, if a person earned money but gave it to another outright, and not in contemplation of death,

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[75]Senate Report 1631, Page 231, Appendix "B", page 109, infra.

[76]See footnote 70, p. 57, supra.

that property is nevertheless economically attributable to him. Would anyone assert that its value could be included in his gross estate without violating the requirements of due process? *Reinecke v. Northern Trust Co.*, supra, and other cases heretofore discussed show us that this cannot be done, even though the donor retained managerial control throughout his life.

Since Congress is without power to tax property for which a decedent is economically responsible when he has made a voluntary and complete gift thereof, not in contemplation of death; the lack of power to tax is much more evident where the decedent never owned the property and the survivor does not acquire it as a result of the decedent's voluntary, donative action. Thus, we say that the theory of economic attribution cannot support the tax.

Even if the theory of economic attribution would justify the tax, it would not save the present statute from invalidity.

An examination of the statute shows that nowhere is its operation dependent upon in anything akin to economic attribution (whatever that may be) except as to compensation for personal services and revenues from separate property. Since community property derived from all other sources is to be included in the gross estate of the first spouse to die, the application of the concept of economic attribution necessarily implies a Congressional declaration that all of the property so included in the estate of the one who dies first is not to any extent economically attributable to the survivor. Thus, in this case, if it had been shown that Mrs. Herbst had

conducted all of the business affairs of the community without aid or assistance from her husband, the statute would nevertheless have required the inclusion of the entire community in the decedent's estate. It could not be said in such a situation that any part of the property came as compensation for her personal services or from her separate property. It is stipulated that neither spouse derived compensation for personal services rendered to another (R. 11), and that the only income from separate property was the insignificant sum which Herbst received from inherited real estate. We have shown above (p. 15, supra), that the rewards from ranching or from managing accumulated savings do not come within the phrase "compensation for personal services actually rendered."[77]

Thus, if economic attribution be the justification for the tax, it is quite clear that the terms of the statute preclude showing whether any part of the community property, other than personal earnings or revenues from separate property, was economically attributable to the survivor. This means

[77]It is also stipulated that the ranch on which the parties lived for most of their lives was acquired largely on credit, that this community debt was paid off through the operation of this ranch, and that the community property on hand at death was derived from the accumulation of savings from the ranching activities and the reinvestment of those savings. Thus, in so far as capital (the ranch properties), rather than personal activities, contributed to the accumulations, it cannot be said in any aspect that community property was derived from personal services actually rendered, no matter how broadly that phrase be defined. The acquisition of property on credit or with borrowed money is a normal incident in the building up of estates everywhere.

that the statute creates a conclusive presumption that the justification for the tax (economic attribution) is present. This was the precise situation that this Court dealt with in *Heiner v. Donnan*, 285 U. S. 312; and *Schlesinger v. Wisconsin*, 270 U. S. 230. There the justification for including certain property in the gross estate was its transfer during life in contemplation of death. But the statute created a conclusive presumption that certain transfers were in contemplation of death, just as, on the hypothesis here assumed,[78] the statute here dealt with conclusively presumes that the community property was economically attributable to the first to die. That this Court in the *Donnan* and *Schlesinger* cases struck down the conclusive presumption that the transfers there involved were in contemplation of death, requiries the same holding here.[79]

If it could be said that the statute permits proof of the extent to which the community property is economically attributable to the survivor, this would not save the present statute from invalidity. It would merely substitute an impossible burden of proof for a conclusive presumption with corresponding practical effects. In the present case we are not so much concerned with economic attribution in the sense of revenues from property as we are with economic attribution in the sense of result of personal effort. To establish the extent to which Mrs. Herbst's per-

[78]That economic attribution is the justification for the tax.

[79]Other authorities require the same conclusion: **Mobile J. & K. R. Co. v. Turnipseed**, 219 U. S. 35; **McFarland v. American Sugar Refining Co.**, 241 U. S. 79; **Tot v. United States**, 319 U. S. 463; **Manley v. Georgia**, 279 U. S. 1.

sonal efforts contributed to the accumulation of the community property taxed to the decedent in this case would require the establishment of her daily activities from marriage in 1901 until her husband's death in 1943. Even more, it would require that the value of those efforts from a financial standpoint, as compared with those which her husband made during the same period of time, be established, so that the trier of fact could say that a fixed percentage of the community estate was economically attributable to the husband, and a fixed percentage economically attributable to the wife. The trier of fact would have to be furnished with evidence as to the mutations in all property acquired from day to day, or upon which either spouse expended efforts. To state this proposition is to show how utterly impossible it is to meet such a burden.

This objection is not met by the Appellants' citation of *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, rehearing denied 302 U. S. 772. The short period of time there involved, the nature of the transactions, and the fact that the manufacturing company was required for its own purposes, as well as for many governmental ones, to keep complete records, minimized the burden which the statute imposed upon it. The record here renders wholly inapplicable Appellants' assertion that to invoke this rule, the Appellee must establish its inability to meet this burden. The stipulated facts establish the utter futility of any such attempt. Constitutional guarantees do not depend upon doing, or even attempting to do, what is clearly impossible. As stated by this Court in

Mobile J. & K. R. Co. v. Turnipseed, supra, the Legislature

> "must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

The statute is otherwise wholly arbitrary, capricious and violative of due process.

From what we have said above it is apparent that it contains all of the pernicious elements of a retroactive statute. In making the tax depend on economic attribution and requiring taxpayers to trace property through its various mutations and changes over a long period of married life, it violates the principles laid down by this Court in *Nichols v. Coolidge*, supra. There the Court condemned as violative of the Fifth Amendment the federal estate tax, where such tax, as here, was "made to depend upon past lawful transactions, not testamentary in character, and beyond recall." See also *Untermyer v. Anderson*, 276 U. S. 440; *Coolidge v. Long*, 282 U. S. 582.

In *Helvering v. Helmholz*, 296 U. S. 93, this Court said (p. 98):

> "Another and more serious objection to the application of Section 302(d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force, the transfer was not taxable as intended to take effect in possession

> or in enjoyment at her death. Reinecke v. Northern Trust Co., 278 U. S. 339 * * * *. If Section 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case, its operation would violate the Fifth Amendment. Nichols v. Coolidge, 274. U. S. 531 * * * * *"[80]

In the *Helmholz* case the property originally belonged to the decedent, and he had made a voluntary transfer in his lifetime, donative in character. If it violates due process retroactively to tax such a voluntary transfer, how much more grievous is it to levy a tax in the instant case with respect to this property, which was never owned by the decedent, but which state law vested in the survivor many years prior to the adoption of the first estate tax law?

The cases which we have cited all recognize that a statute purporting to tax may be so arbitrary and capricious, wholly aside from its retroactivity, as to amount to confiscation and offend the Fifth Amendment. When *Section 811(e)*, here involved, is considered in connection with the community property amendments generally, and when the other sections of the federal income, estate and gift tax laws contained in the Revenue Act of 1942 and in the Internal Revenue Code are also considered; the arbitrary, whimsical and confiscatory character of this and the related amendments plainly appear. The Amendment will serve completely to confiscate many estates. It will encourage divorce. It treats two persons as owning,

[80]It should be noted that Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo concurred in the result on the above ground.

for estate tax purposes, the identical property at the same time. It makes the tax depend upon the sheer accident of which of the two spouses happens to die first. It selects one factor (cessation of management) for the occasion of the tax when one spouse dies, and different factors (economic attribution or testamentary power) in case of the death of the other spouse. It treats one spouse as owner for gift tax purposes,[81] and the other spouse as the owner of the same property for income and estate tax purposes. It even treats two different persons as having made the identical gift at the same time.[82] A mere change of domicile shortly before death would entirely alter the incidence of the tax as would a divorce without such change in domicile.[83] The plain scheme of the Act is to tax the first spouse to die upon the bulk, if not all, of the community property, but at the death of the survivor, no matter how

[81]Sec. 1000 (d), Internal Revenue Code, as amended by Sec. 453, Revenue Act of 1942.

[82]In the case of revocable transfers or transfers in contemplation of death.

[83]While the law of the new domicile will not recognize community property eo nomine, it will recognize that the property acquired in a community property state is owned one-half by each spouse as tenants in common, and the husband will be considered as trustee of the wife's one-half, and be accountable to the wife. **Depas v. Mayo**, 11 Mo. 314; **Succession of Popp.** 146 La. 464, 83 So. 765; **Phillips v. Commissioner**, 9 B. T. A. 153; **Restatement Conflict of Laws**, Secs. 292 and 293. Similarly, upon divorce when no partition of the property is demanded, the parties hold as tenants in common and not in community. See Footnote 44, page 33, supra. Since the parties in each case would hold as tenants in common, and not in community, the 1942 Amendments would be inapplicable.

soon thereafter, to tax that survivor upon what she or he actually owns.[84] This is true whether or not the second death occurs within five years of the first.[85] It would include in the gross estate of the first spouse to die the bulk or all of the community property, but allow as a deduction only that part of the community debts which the law of the local jurisprudence allows as claim against the decedent's estate, to wit, one-half of the community debts.[86] This will

[84]See footnote 61a, p. 45, supra.

[85]The fact that since this controversy was initiated the Treasury Department has attempted partially to cure this by Regulation. (Footnote 52, pp. 62, 76-78 La. brief) does not change the correctness of what was said above. The prior tax property credit is by statute limited to property which "can be identified as having been received by the decedent, * * * * from such prior decedent by gift, bequest, devise or inheritance, or which can be identified as having been acquired in exchange for property so received." Section 812(c), I. R. C., Appendix "A", p. 102, infra. Although the statutory plan is indefensible, it cannot be cured by administrative action. Lang v. Commissioner, 289 U. S. 109.

[86]Footnote 52, p. 62 of Appellants' Louisiana brief is revealing. Although this law has been in force approximately three years, administrative regulations have not been amended to announce the principle which Appellants say was contained in a letter "to an Internal Revenue Agent in Texas." Were this statement to come from a private litigant, we might be tempted to believe that, after the controversy which produced the confidential letter had terminated, an official ruling would follow the statute and conform to what this Court said was necessary in Lang v. Commissioner, 289 U. S. 109. If taxpayers have the right which the letter "to an Internal Revenue Agent in Texas" purports to grant, they would feel much more certain of securing these rights if, when the Regulation was amended to deal with property previously taxed, a corresponding amendment as to debts

confiscate many otherwise solvent estates, large and small. It would treat as passing at death, for estate tax purposes, the bulk or all of the community property. And yet, when the survivor subsequently disposes of his or her share, it would measure the gain by the original cost to that survivor and not by the estate tax shown in the estate tax return.[87]

It may fairly be said that the attention of Congress was never specifically called to the many glaring defects of the statute. Congress was misled by the charge of preferential treatment predicated upon the alleged unreality of the community property system. Congress was thus led to enact a law more lacking in due process, and more arbitrary, whimsical and capricious than any law which this Court has ever had before it.

III.

THE STATUTE LACKS GEOGRAPHIC UNIFORMITY.

Recognizing fully that *Section 8 of Article 1* of the *United States Constitution* requires geographic, not intrinsic, uniformity, and that it is no objection to a federal tax from the standpoint of uniformity that the subject of the tax may not be found throughout the United States,[88] we think it demonstrable

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and claims had been made; assuming any such change without statutory support would be valid. The Appellants' assertion should be considered in the light of the fact that, at the very time it was made, the Commissioner was taking and maintaining an inconsistent position. **Estate of Robert H. Hartley**, 5 T. C.—(76), promulgated Aug. 28, 1945.

[87] **Lang v. Commissioner**, 289 U. S. 109.

[88] **Edye v. Robertson**, 112 U. S. 580. (Head Money Cases).

that the Court below correctly held that the present tax violated this requirement of geographic uniformity (R. 20, 22). There is no room for controversy as to the test applicable to determine whether a tax violates the uniformity requirement. The Court below properly held:

> "The requirement is that the same plan and the same method be used throughout the United States, and the same subject be taxed throughout the United States at the same rate. *Knowlton v. Moore*, supra. The rule of liability must be the same in every state. *Florida v. Mellon*, 273 U. S. 12." (R. 20, 21).

The statute expressly and intentionally violates the aforesaid requirement. It is neither unimportant nor unintentional that in express terms the statute applies only to certain geographic subdivisions of the United States, to-wit, the community states.[89]

The rule of estate tax liability in forty states of the United States is that a decedent's gross estate is measured by that property which he owned at death, that over which he had power of testamentary disposition, and that of which he had previously made a transfer, incomplete or in contemplation of death. If the statute is valid, that plan is departed from in the community property states, and in those states

[89]The Committee Reports show that this legislation was directed exclusively at "husband and wife living in community property states." The Committee Reports also show that Congress knew at the time that certain states in the Union were popularly designated as community property states and others were not. The law was purposely drafted to apply to only those states popularly known as the community property states. See Appendix "B", p. 109, infra.

alone, because only there the statute requires the inclusion in a decedent's gross estate of property which he did not own, over which he had no power of testamentary disposition, and of which he had never made a transfer of any kind or character. If the tax is, as the statute says it is, a tax upon the transfer of a decedent's net estate, the measure and rate of tax differs according to the geographic location of the property.

It is no answer to say that if community property were found in other states, it would be taxed as it is in the "community property" states. The tax is not on a name. Community property is not a peculiar species of property as are tobacco and liquor. Nor does the statute purport to tax community property as such.

Under Appellants' argument, the tax must be justified because there is a transfer of property, which we have disposed of above; or because there is a cessation of management, or because of the factor of economic attribution.

As to cessation of management, it is clear that the requirement of uniformity, contained in the Constitution, is not so trivial and meaningless that a mere difference in terminology satisfies, or fails to satisfy, the requirement of uniformity. Were this not so, Texas could avoid all of the consequences here complained of by merely changing the name of its marital property system and calling it a co-tenancy. In point here is the holding of the Fifth Circuit Court of Appeals in *Constantine v. United States*, 75 F. 2d 928, affirmed on other grounds 296 U. S. 287, which

dealt with a special tax levied upon the sale of alcoholic beverages contrary to the law of the State where the sale took place. It was there said at page 931:

> "Significant, too, is its ambulatory character, applying not by application in particular localities of a rule geographically uniform, but by its own terms, now here, now there, in this or that state, this or that locality according to state laws or local conditions."

Exactly the same rights of management over the wife's property may exist in a non-community property state, yet the manager's death will not sweep his wife's property into his gross estate. Commercial partnerships between husband and wife in other states are common. Some have and some have not the element of the husband being the managing partner. Many non-community property states permit spouses to make contracts establishing a type of ownership which possesses all of the attributes of community ownership except the name.[90] Trusteeships, partnerships with managing partners, guardianships, agencies coupled with an interest, are all instances where in other states management terminates without an attendant tax liability. The lack of uniformity is apparent.

If the factor determining the application of the tax under the Community Property Amendment is the fanciful theory of economic attribution, here again there is a complete lack of uniformity. All property

[90]McKay Community Property (2d Ed.) Sec. 142.

owned by one spouse and completely donated to the other, not in contemplation of death, is economically attributable to the donating spouse in at least as full and complete a sense as any part of the community property in this case is economically attributable to the decedent, Herbst. Yet the books are full of cases in which such complete gifts, not in contemplation of death, have been made to one spouse by the other without the donated property being brought into the gross estate of the donor. Also, in such states husbands and wives may assist each other, financially or by services, in acquiring their wealth, yet they are not taxed jointly.

A striking illustration of lack of uniformity occurs in those instances in which the spouses move from a community property state; or, without moving, invest community funds in real estate situated in a non-community property state. In both situations. their investments are not held as community property under the law of any state, and therefore only the decedent's one-half of such property is included in his or her gross estate. Yet the rights of the spouses in those properties, worked out under the common law theory of trusteeship, or cotenancy, are in every substantial respect the same as they would have been, had the spouses continued to live and invest, either or both, in a community property state.[91]

[91]See cases cited in footnote 83, p. 77, supra, and **Johnson** v. **Commissioner**, 88 F. 2d 952-955, 105 F. 2d 454; and I. T. 1268, C. B. I.-1 p. 234.

Property is property, wherever situated, and unless the constitutional requirement of uniformity is satisfied by the mere fact of a difference in nomenclature between the states, we respectfully submit that the statute presently involved plainly violates the constitutional requirement of geographic uniformity.

IV.

TO THE EXTENT THAT THE TAX IS COLLECTIBLE FROM THE SURVIVOR'S SHARE OF COMMUNITY PROPERTY, IT IS A DIRECT TAX, INVALID BECAUSE NOT APPORTIONED.

A tax is a direct tax if it is imposed upon property solely because of its ownership.[92] We have heretofore shown that neither a shift of managerial control nor the factor of economic attribution in the acquisition of property is an excisable event. It has been fully demonstrated that the spouses in Texas own equally all community property. The tax, therefore, to the extent that it is borne by the wife, is imposed upon her merely because she owned a share of the property. Being unapportioned, it must fall under the provisions of the *Third Clause of Section 2, Article 1,* and the *Fourth Clause of Section 9, Article 1,* of the *Constitution.* This, of course, assumes that some share of this levy is to be satisfied out of the wife's share of community property. If, to meet this objection the Appellants recede from the position taken (pp. 49-50 La. brief), that the tax is to be apportioned between the surviving spouse and the decedent, this but serves to emphasize that the tax is laid upon one, but measured by the property of an-

[92]**Pollock v. Farmers' Loan and Trust Co., 158, U. S. 601,**

other, and is therefore wholly arbitrary, capricious and lacking in due process.

The point may be forcefully illustrated by a typical case of the acquisition by spouses in Texas during marriage with borrowed money, of an oil and gas royalty, a type of property requiring no management or control. The royalty becomes productive, and the debt is paid off with the oil runs. The wife then dies. Clearly in such case there would be no excisable event. There is no cessation of control on the wife's death. Nor can the royalty so acquired be economically attributable exclusively to her. Yet the whole of the property would be taxed to her estate under this law. If, therefore, the Appellants are correct in saying that the surviving husband would bear the burden of a part of the tax on such community property, clearly such tax must be a tax on property owned by him, and void because unapportioned.

V.

BY INVADING THE FIELD OF MARITAL PROPERTY RIGHTS RESERVED TO THE STATES, THE STATUTE VIOLATES THE TENTH AMENDMENT.

The 1942 Amendment also constitutes an unwarranted invasion by the Federal Government of powers reserved to the States by the Tenth Amendment. Having due regard for Chief Justice Marshall's oft-quoted statement that "the power to tax involves the power to destroy," a sustaining of this law will be but the first step in the complete destruction of that dual system of Government upon which our Constitution is founded. Here we have a statute that taxes property held under the laws of the community

property states differently from property held by citizens of other states. It is, of course, axiomatic that matters of property rights and marital relations are left exclusively to the states for their governing, and that such matters are not within the power of Congress to regluate.[91] If Congress may tax citizens of certain states with respect to their property rights merely because Congress, perchance, does not approve of the property laws of those states, it would mean that Congress, through its taxing power, may regulate entirely all property and marital laws of the several states. Our Constitution and our system of government never contemplated such use of the taxing power.

These principles are made evident by the statement of Mr. Justice Cardozo in *Chas. C. Steward Mach. Co. v. Davis*, 301 U. S. 548, where it was said:

> "We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject-matter to activities fairly within the scope of national policy and power. * * * * It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. The Child Labor Tax Case, 259 U. S. 20 * * * * and Hill v. Wallace, 259 U. S. 44 * * * * were decided in the belief that the statutes there condemned were exposed to that reproach."

[91] **Ohio v. Agler, 280 U. S. 379.**

The Appellants suggest (La. brief pp. 64-65) that the community property states may escape the burdensome effect of the 1942 Amendments by changing their local statutes and Constitutions. But if this is the only alternative, it means that Congress, through this tax, is indirectly regulating the property and marital systems of eight states in the Union. It is this type of regulation that this Court condemned in the *Child Labor Tax Case* referred to in the *Steward* case above, and it is this type of statute which this Court in the *Steward* case expressly refused to sanction. In no proper sense can it be said that state marital property laws bear the inter-relation to the Federal Government's fiscal need which this Court in the *Steward* case, supra, said was necessary to save them from such an undue interference with local matters as to violate the Tenth Amendment. Or Congress could interfere with and tax every change which other states have made in their marital property systems because an incidental but necessary effect of those changes was to decrease one spouse's taxable income or taxable estate. It clearly requires no authority to establish the proposition that, directly, the Federal Government is without competence in the field of marital relations and marital property rights. A holding that the Federal Government can gain competence in that field by a tax directed to the wholesome and equitable results of the system employed in some states is the practical equivalent of giving to the Federal Government direct control over those marital systems.

We are not dealing with a tax, we are sure this Court will agree, directed at something detrimental to the public interest—something akin to the unregulated traffic in fire arms.[94] We are not dealing with an anti-social practice, like child labor. We are not dealing with social dangers—subjects like narcotics or liquor.[95] Instead, the tax here is directed at a statutory system which gives meaning and force to the marital covenant that each spouse endows the other with all his worldly goods, and which recognizes, more fully than any other marital system, the fact that a wife has rights and makes contributions to the marital partnership of which she is a full member, which contributions socially and economically equal whatever her husband may contribute. Congress cannot, and should not, interfere with such a system.

VI.

THE TRIAL COURT'S STATEMENT THAT THE FACTS OF THIS CASE ARE TYPICAL.

Appellants' alarm over the observations made by the Court below (quoted in full herein at page 6, supra) is revealing. This concern leads Appellants to make statements entirely outside the record. These statements contain implications which are quite inaccurate. Certainly, it is entirely incorrect to attribute to the trial court any knowledge of the tedious negotiations which led to the making of the stipulations upon which this case was submitted, or any

[94] **Sonzinsky v. United States**, 300 U. S. 506.

[95] **Nigro v. United States**, 276 U. S. 332.

action to supply what Appellants infer are inadequacies in the Stipulation.[96]

The alarm displayed by Appellants is due to the fact that they desire to induce this Court to believe that the wife's rights in community property are gratuitous and fictional and do not result from the recognition which the community property system affords to her merit and the value of her efforts. The Court's right judicially to notice the ordinary incidents customarily arising in the lives of married people living on ranches is clear. Paraphrasing somewhat Chief Justice Taft's remark, if the trial court did not know these facts, he is the only person in Texas who does not know them. He was perfectly

[96]It was alleged (R. 4) and admitted (R. 9) that the taxing officers investigated the estate tax return prior to the assessment. It is equally true, though not shown by the record, that a second and special investigation was made while the Stipulation was under consideration. The Petition was filed November 10, 1944 (R. 2); the Stipulation was executed January 9, 1945 (R. 12), and the case was submitted and argued and the Stipulation filed February 12, 1945 (R. 1). We challenge Appellants' statement that anything with respect to Mrs. Herbst's activities was omitted from the record because of a lack of time to investigate into the facts, and we say that although it was well understand that this was a test case, Appellants' attorneys took every possible step to handpick a nontypical extreme case in which they could assert an entire absence of economic activity upon the part of a surviving wife. They expressly refused to cooperate in expediting, or using as a test case, one in which the wife was the first to die. They were furnished with proof of Mrs. Herbst's valuable economic activities as valid as they were furnished or otherwise obtained with respect to any stipulated fact; in fact, more, for Appellants admit in their brief that affidavits were furnished them on this point (Texas Brief, p. 16).

justified in stating these judicially known facts which furnish a substantial basis for the community property system, and which apply to approximately one-third of Texas' population.

The important fact is that, in the great majority of cases to which the statute here in question was designed to apply, wives do most materially assist their husbands, economically and otherwise, in and outside of the household, in acquiring *and preserving* the community property. Under innumerable decisions the Court can judicially notice these things "The Court takes judicial notice of things commonly known concerning family life and household economy * * * *" *31 C. J. S.*, Sec. 84, pp. 679, 680. The invalidity of a statute "may be shown by things which will be judicially noticed * * * * or by facts established by evidence." *Weaver v. Palmer Bros. Co.*, 270 U. S. 402. "* * * * the kind of work done on a farm is common knowledge." *Mundel v. Swedlund* 80, Pac. 2d 13. This Court has approved the action of a trial court in taking judicial notice of a general use of coal oil for kindling fires. *Waters Pierce Oil Company v. Deselms*, 212 U. S. 159. The ordinary family matters are particularly within the realm of judicial notice. *Succession of Curtis*, 109 So. 832; *Federal Land Bank of New Orleans v. Stanfield*, 14 So. 2d 654; *Coulter v. Meining*, 172 N. W. 910.

On numerous occasions this Court has judicially noticed business and economic matters even with reference to a particular industry like the raisin industry. *Parker v. Brown*, 317 U. S. 341, 363. In *Chas. C. Steward Machine Company v. Davis*, 301 U. S. 548, this Court judicially noticed many factors as to the economic results of the recent depression.

Appellants' alarm in this respect arises, we charge, from the fact that it is realized that the fanciful theory of economic attribution is their last prop to support the validity of the tax here involved and it has been brought home to them that the statute was drawn so that it denies taxpayers the right to establish the existence of economic attribution and imposes upon them an impossible burden of proof, if they should be permitted so to do. It is that, and not the truisms stated by the Court below, which causes the Appellants so much concern on this point.

CONCLUSION

In Texas, the wife owns, earns and merits, one-half of all community property as fully as her sisters in other states own what the laws of those states permit them to own. Recognition of that ownership for tax and all other purposes is not discriminatory. But to disregard this ownership and tax the wife's prop-

erty as if it belonged to the husband will be a gross discrimination, and invalid for the several reasons heretofore discussed.

The Judgment below should be affirmed.

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APPENDIX "A"

CONSTITUTION OF THE UNITED STATES:

Article 1

SECTION 2. * * * * * *

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, * * * *

* * * * * * * *

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * * * * *

SECTION 9. * * * * * *

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

INTERNAL REVENUE CODE:

Income Tax Chapter 1

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; except that—

* * * * * * * *

(5) PROPERTY TRANSMITTED AT DEATH.— If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument

had been a will executed on the day of the grantor's death. For the purpose of this paragraph property passing without full and adequate consideration under a general power of appointment exercised by will shall be deemed to be property passing from the individual exercising such power by bequest or devise. If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, and if the decedent died after August 26, 1937, and if the property consists of stock or securities of a foreign corporation, which with respect to its taxable year next preceding the date of the decedent's death was, under the law applicable to such year, a foreign personal holding company, then the basis shall be the fair market value of such property at the time of such acquisition or the basis in the hands of the decedent, whichever is lower. In the case of an election made by the executor under section 811(j), the time of acquisition of the property shall, for the purpose of this paragraph, be the applicable valuation date of the property prescribed by such section in determining the value of the gross estate.

Estate Tax Chapter 3.

SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. (Rates Omitted).

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall

be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) DECEDENT'S INTEREST.—To the extent of the interest therein of the decedent at the time of his death;

(b) DOWER OR CURTESY INTERESTS.—To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years

prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) REVOCABLE TRANSFERS—

(1) TRANSFERS AFTER JUNE 22, 1936.—

* * * *

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936.—

* * * * * * * *

(3) DATE OF EXISTENCE OF POWER.—

* * * *

(4) RELINQUISHMENT OF POWER IN CONTEMPLATION OF DEATH.— * * *

(5) TRANSFERS OF COMMUNITY PROPERTY IN CONTEMPLATION OF DEATH, ETC.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

(e) JOINT AND COMMUNITY INTERESTS.—

(1) JOINT INTERESTS.—To the extent of the interest therein held as joint tenants by the de-

cedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) COMMUNITY INTERESTS.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the

United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testimentary disposition.

(f) POWERS OF APPOINTMENT.—

(1) IN GENERAL.— * * * *

(2) DEFINITION OF POWERS OF APPOINTMENT.— * * * *

(3) DATE OF EXISTENCE OF POWER.— * * * *

(g) PROCEEDS OF LIFE INSURANCE.—

(1) RECEIVABLE BY THE EXECUTOR.— * * * *

(2) RECEIVABLE BY OTHER BENEFICIARIES.— * * * *

(3) TRANSFER NOT A GIFT.— * * * *

(4) COMMUNITY PROPERTY.— For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such

part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term "incidents of ownership" includes incidents of ownership possessed by the decedent at his death as manager of the community.

(h) PRIOR INTERESTS.— Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

(i) TRANSFERS FOR INSUFFICIENT CONSIDERATION.— * * * *

(j) OPTIONAL VALUATION.— * * * *

(k) VALUATION OF UNLISTED STOCK AND SECURITIES.— * * * *

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) EXEMPTION.—An exemption of $100,000;

(b) EXPENSES, LOSSES, INDEBTEDNESS, AND TAXES.—Such amounts—

(1) for funeral expenses,
(2) for administration expenses,
(3) for claims against the estate,
(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and
(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent,

as are allowed by the laws of the jurisdiction, whether within, or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; except that in any case in which any such claim is founded upon a promise or agreement of the decedent to make a contribution or gift to or for the use of any donee described in subsection (d) for the purposes specified therein, the deduction for such claim shall not be so limited, but shall be limited to the extent that it would be allowable as a deduction under subsection (d) if such promise or agreement constituted a bequest. There shall be disallowed the amount by which the deductions specified in paragraphs (1), (2), (3),

(4), and (5) exceed the value, at the time of the decedent's death, of property subject to claims. For the purposes of this section the term "property subject to claims" means property includible in the gross estate of the decedent which, or the avails of which, would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate; and, for the purposes of this definition, the value of the property shall be reduced by the amount of the deduction under the next sentence attributable to such property. There shall also be deducted losses incurred during the settlement of estates arising from fires, storms, shipwrecks, or other casualties, or from theft, when such losses are not compensated for by insurance or otherwise, and if at the time of the filing of the return such losses have not been claimed as a deduction for income tax purposes in an income tax return.

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

(c) PROPERTY PREVIOUSLY TAXED.— An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by

gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. * * * *

(d) TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.— * * * *

SEC. 822. PAYMENT OF TAX.

(a) TIME OF PAYMENT.—

(1) GENERAL RULE.— The tax imposed by this subchapter shall be due and payable fifteen months after the decedent's death.

(2) EXTENSION OF TIME.— * * * *

(b) LIABILITY FOR PAYMENT.— The tax imposed by this subchapter shall be paid by the executor to the collector.

SEC. 826. COLLECTION OF UNPAID TAX.

(a) SALE OF PROPERTY.— * * * *

(b) REIMBURSEMENT OUT OF ESTATE.— If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment

of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) LIABILITY OF LIFE INSURANCE BENEFICIARIES.— Unless the decedent directs otherwise in his will, if any part of the gross estate upon which tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935(c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

(d) LIABILITY OF RECIPIENT OF PROPERTY OVER WHICH DECEDENT HAD POWER OF APPOINTMENT.— * * * *

SEC. 827. LIEN FOR TAX.

(a) UPON GROSS ESTATE.— Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Com-

missioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) LIABILITY OF TRANSFEREE, ETC.— If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811(b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827(a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.41 (as amended by T. D. 5408, 1944 Cum. Bull. 578) *Deduction of the value of transfers previously taxed.*—If there is included in the decedent's gross estate property received by him by gift from any person, within five years prior to his death, or received by gift, bequest, devise, or inheritance from any person who died within five years prior to his death, or property acquired in exchange for property so received, the Internal Revenue Code authorizes a deduction in respect thereof, subject to the following conditions and limitations, namely:

(a) *Conditions.*—

(1) The property respecting which the deduction is sought must have been received by the decedent as a gift within five years prior to his death, or received by him by gift, bequest, devise, or inheritance from a prior decedent who died within five years of the decedent's death. Notwithstanding the designation by local law of the capacity in which the decedent takes, for the purposes of this deduction, property received by gift, bequest, devise or inheritance includes property, or rights with respect to property, held by or devolving upon the decedent as spouse under dower or curtesy laws or laws creating an estate in lieu of dower or curtesy, as spouse under community property laws, as tenant of a tenancy by the entirety or joint tenancy with survivorship rights, as donee (possessor) of a power of appointment, as appointee under the exercise of a power of appointment, as remainderman under the release or nonexercise of a power of appointment, or as beneficiary of life insurance.

T. D. 5239, 1943 Cum. Bull. 1081:

In order to conform Regulations 105 (Part 81, Title 26, Code of Federal Regulations, 1942 Sup.) to certain sections of the Revenue Act of 1942 (Public law 753, Seventy-seventh Congress), approved October 21, 1942, and to the Joint Resolution of December 17, 1942 (Public law 809, Seventy-seventh Congress), such regulations are amended as follows:

Par. 14. Section 81.23 is amended to read as follows:

Sec. 81.23. Community Property.— In the case of estates of decedents dying after October 21, 1942, the gross estate includes the entire community property held by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. Section 811 (e) (2) also provides that in no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

Property derived originally from compensation for personal services actually rendered by the spouse or from separate property of the spouse includes any property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such

separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner. The burden of identifying the property which may be excluded from the community interest rests upon the executor.

APPENDIX "B"

H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 35-37, 160 (1942-2 Cum. Bull. 372, 401):

* * * * * *

3. Community Interests

For the purpose of Federal estate taxation, husband and wife living in community-property States enjoy a preferential treatment over those living in non-community-property States. This is due to the fact that all of the property acquired by the husband after marriage, through his own efforts, in a community-property State is treated as if one-half belonged to the wife. In non-community-property States, all such property is regarded as belonging entirely to the husband. The difference in the amount of the Federal estate tax is enormous as shown by the following tables:

* * * * * *

It will be noted from the above table that in some instances there is an entire exemption from the Federal estate tax for the reason that the omission of one-half of the community property reduces the husband's net estate below the minimum exemption of $40,000. Moreover, this halving of community property greatly reduces the estate tax because of the progressive rates. For example, under the present law, a net estate of $50,000 will pay an estate tax of $500 in a non-community-property State and no tax in a community-property State. An estate of $100,000 will pay a tax of $9,500 on the death of the husband in a non-community-property State and a tax of $500 on the death of the husband in a community-property State.

If the wife dies within 5 years of her husband, the remaining $50,000 upon which the husband paid no estate tax will be subject to an estate tax of $500. Thus, the total tax paid on this $100,000 estate in the community-property State will be $1,000 as compared with $9,500 in the non-community-property State or a tax saving of $8,500. In the case of a $5,000,000 estate, the tax saving in a community-property State will amount to as much as $485,800 and in the case of a $10,000,000 estate, the tax saving in a community-property State will amount to as much as $1,171,800.

Your committee seeks to remedy this situation by providing that such property is includible in the gross estate of the husband unless it can be shown to have been received as compensation for personal services actually rendered by the surviving wife or derived originally from such compensation or other separate property of the surviving wife. This follows somewhat the treatment which is accorded to joint estates under the existing law. The existing statute has been upheld by the Supreme Court in numerous cases.

* * * * *

SECTION 402. COMMUNITY INTERESTS.

This section eliminates special estate tax privileges enjoyed by residents of community property jurisdictions by amending section 811 (e) of the Internal Revenue Code. A new paragraph (2) is added after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such

part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. The amendment thus makes due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor, subject, however, to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

* * * * *

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 231-232 (1942-2 Cum. Bull. 504):

SECTION 402. COMMUNITY INTERESTS.

This section, which corresponds to section 402 of the bill passed by the House, eliminates special

estate tax privileges enjoyed by virtue of the community property system. The corresponding section of the House bill amended only section 811 (e) of the Code, relating to joint interests. Your committee bill adds an amendment to section 811 (d) relating to revocable transfers. A new paragraph (5) is added to section 811 (d), providing that for the purposes of section 811 (c) and (d), a transfer of property held as community property by the decedent and surviving spouse shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. A new paragraph (2) is added to section 811 (e) after the existing paragraph dealing with joint estates and estates by the entirety, which is now made paragraph (1). Such paragraph (2), relating to community property of husband and wife, provides that such property is includible in the gross estate with the exception of such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

The amendments thus make due provision for the exclusion from the gross estate of that portion of the community property which is economically attributable to the survivor. Section 811 (e) (2), however, is subject to the provision that in no case shall the value of the property included in the gross estate of the decedent be less than

the value of such part of the community property as was subject to the decedent's power of testamentary disposition. Property "derived originally from" compensation or from separate property of the surviving spouse includes (1) property acquired in exchange for property received as compensation or in exchange for separate property, (2) community income yielded by such property and property acquired with such income, and (3) property which may be traced back to property received as compensation, separate property, income from property received as compensation, or income from separate property. The statute establishes a uniform Federal rule for apportioning the respective contributions of the spouses regardless of varying local rules of apportionment. State presumptions are therefore not operative against the Commissioner.

APPENDIX "C"

Pertinent Provisions of the Constitution and Statutes of the State of Texas

CONSTITUTION OF TEXAS:

Article 16, Sec. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent; shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

REVISED CIVIL STATUTES OF TEXAS:

Article 2578. Community estate

Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

Article 2582. Bastards inherit from mother

Bastards shall be capable of inheriting from and

through their mother, and of transmitting estates, and shall also be entitled to distribute shares of the personal estates of any of their kindred, on the part of their mother, in like manner as if they had been lawfully begotten of such mother.

Article 3627. Of common property.

When a husband or wife shall die leaving any common property, the survivor may, at any time after letters testamentary or of administration have been granted, and an inventory, appraisement and list of the claims of the estate have been returned, make application in writing to the court which granted such letters for a partition of such common property, which application shall be acted upon at some regular term of the court.

Article 3628. Action and bond in such case

The surviving husband or wife shall execute and deliver to the county judge an obligation with two or more good and sufficient sureties, payable to and approved by said county judge, for an amount equal to the value of his or her interest in such common property, conditioned for the payment of one-half of all debts existing against such common property, and the county judge shall proceed to make a partition of said common property into two equal moieties, one to be delivered to the survivor and the other to the executor or administrator of the deceased. The provisions of this chapter respecting the partition and distribution of estates shall apply to such partition so far as the same may be applicable.

Article 3629. Lien upon property delivered

Whenever such partition is made, a lien shall exist upon the property delivered to the survivor to secure the payment of the aforesaid obligation; and such obligation shall be filed with the clerk and recorded in the minutes of the court; and any creditor of said common property may sue in his own name on such obligation, and shall have judgment thereon for one-half of such debt as he may establish, and for the other half he shall be entitled to be paid by the executor or administrator of the deceased.

Article 3630. Property held by executor

Until such partition is applied for and made, the executor or administrator of the deceased shall recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto.

Article 3661. Community property

The community property of the husband and wife except such as is exempt from forced sale, shall be liable for all the debts contracted during marriage. And, in the settlement of such community estates, the survivor, executor or administrator shall keep a separate and distinct account of all the community debts allowed or paid in the settlement of such estates.

Article 3662. Where there is no child

Where the husband or wife dies intestate, or becomes insane, having no child or children, and no separate property, the common property passes to the

survivor, charged with the debts of the community; and no administration thereon or guardianship of the estate shall be necessary.

Article 3663. When husband shall have management

Where the wife dies or becomes insane, leaving a surviving husband and child, or children, the husband shall have exclusive management, control and disposition of the community property in the same manner as during her lifetime, or sanity; and it shall not be necessary that the insane wife shall join in conveyances of such property, or her privy examination and acknowledgment to be taken to such conveyances, subject, however, to the provisions of this chapter.

Article 3664. Application for community administration

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Article 3665. Court appoints appraisers

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Article 3666. Inventory, appraisement, etc.

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Article 3667. Bond of survivor

The surviving husband shall, at the time he returns the inventory, appraisement, and list of claims, present to the court his bond with two or more good and sufficient sureties, payable to and to be approved by the county judge, in a sum equal to the whole of the value of such community estate as shown by the appraisement, conditioned that he will faithfully administer such community estate, and pay over one-half the surplus thereof after the payment of the debts with which the whole of such property is properly

chargeable to such person or persons as shall be entitled to receive the same.

Article 3668. Action of the court

When such inventory, appraisement, list of claims and bond are returned to the county judge, he shall, either in term time or vacation, examine the same and approve or disapprove them by an order to that effect entered upon the minutes of the court, and, when approved, they shall be recorded upon the minutes of the court, and the order approving them shall also authorize such survivor to control, manage and dispose of such community property in accordance with the provisions of this chapter.

Article 3669. Survivor has control

When the order mentioned in the preceding article has been entered, such survivor, without any further action in the county court, shall have the right to control, manage and dispose of such community property as may seem for the best interest of the estate and of suing and being sued with regard to the same, in the same manner as during the lifetime of the deceased; and a certified copy of the order of the court mentioned in the preceding article shall be evidence of the qualification and right of such survivor.

Article 3672. Survivor to pay debts

The survivor shall pay all just and legal community debts, as soon as practicable, and according to the classification and in the order prescribed for the payment of debts in other administrations.

Article 3678. Surviving wife

The wife may retain the exclusive management, control and disposition of the commuunity property of herself and deceased or insane husband in the same manner, and subject to the same rights, rules and regulations as provided in the case of the husband and until she shall, in the event of the death of the husband, marry again, and in such event her right to manage, control and dispose of the community property shall cease; provided, however, that when no administration is had upon the estate of the deceased husband, as is provided under Article 3680, she may renew, and extend the maturity date, of valid existing debts of the community estate, and any lien securing same.

Article 3679. "Survivor"

The use of the words, "survivor" or "surviving" in the foregoing articles of this chapter, where no other designation is given, shall be held to apply as well to a sane person representing an insane person.

Article 3680. Rights of wife cease when

Upon the marriage of the surviving wife, she shall cease to have control and management of said estate or the right to dispose of the same; and said estate shall be subject to administration as in other cases of deceased persons' estates.

Article 3681. May have partition

After the lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any

portion thereof, shall be entitled to have a partition and distribution thereof in the same manner as in other administrations.

Article 3682. Recovery of insane spouse

Whenever such insane husband or wife shall have recovered sanity, then all action hereunder shall cease, and a report shall be made under oath of all transactions had and done under said proceedings; and said report shall be filed and recorded in the court where such proceedings were had, and with the other papers of the case.

Article 4613. Husband's separate property

All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her mariage with him, nor for torts of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal.

Article 4614. Wife's separate property

All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. The wife shall have

the sole management, control, and disposition of her separate property, both real and personal, provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law.

Article 4615. Compensation for personal injuries to wife

All property or moneys received as compensation for personal injuries sustained by the wife shall be her separate property, except such actual and necessary expenses as may have accumulated against the husband for hospital fees, medical bills and all other expenses incident to the collection of said compensation.

Article 4616. Wife's separate property protected

Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband nor of torts of the husband.

Article 4617. When wife may convey, etc.

If the husband be insane or shall have permanently abandoned his wife, or shall refuse to join in such encumbrance, conveyance or transfer of such property, the wife may apply to the district court of the county

of her residence, and the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interests of the wife, shall make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, and she may then encumber, convey or transfer said property without such joinder.

In event the wife is a non-resident, she may apply to the district court of the county where the property, or a portion thereof, is situated, and the court shall hear and determine such application and grant relief the same as if the applicant were a resident of this State.

Article 4618. Sale of homestead

The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property.

Article 4619. Community property

Sec. 1. All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife; and all the effects which the husband and wife possess at

the time the marriage may be dissolved shall be regarded as common effects or gains, unless the contrary be satisfactorily proved. During coverture the common property of the husband and wife may be disposed of by the husband only; provided, however, if the husband shall have disappeared and his whereabouts shall have been and remain unknown to the wife continuously for more than twelve months, the wife shall after such twelve month period and until the husband returns to her and the affidavit hereinafter provided for is made and filed for record, have full control, management and disposition of the community property, and shall have the same powers with reference thereto as are conferred by law upon the husband, and her acts shall be as those of a feme sole.

Sec. 2. If the wife shall hereafter desire to exercise any of the powers herein conferred upon her, she shall file a petition in writing under oath in the district court of the county in which the husband resided at the time of such disappearance, if he then resided in this State, or in the district court of the county in which the wife resided, if the husband was a non-resident of this State at the time of disappearance, or of any county in which the community property or part thereof is situated in which petition the wife shall set forth the facts entitling her to control, manage and dispose of the community property under the provisions of this article.

Sec. 3. After the filing of said petition the judge of said court shall set the same down for hearing, either in term time or vacation.

Sec. 4. Notice of the filing of said petition and the date set for the hearing thereon shall be issued by the clerk of the court in which the petition is filed and the same shall be published in some newspaper of general circulation published in the county in which the petition is filed, if there be a newspaper published in said county, but if not then in the nearest county where a newspaper of general circulation is published, once in each week for two consecutive weeks previous to the date set for said hearing, the first of which publications shall be not less than ten days prior to such date set for such hearing.

Sec. 5. If, upon the hearing of said petition, the judge shall be satisfied that the facts alleged therein are true, and that facts exist which entitle the wife to control, manage and dispose of the community property under the provisions of Section 1 of this Act, he shall make his order finding and setting out such facts, and thereafter the wife shall have the same powers over the community property as are conferred by law upon the husband, until the husband shall have returned to the wife, and until either the husband or wife shall make and file for record in the office of the county clerk of the county in which said petition was filed, his or her affidavit stating the fact of such return. Said affidavit shall be recorded in the deed records of said county and may be recorded in the deed records of other counties in which the property of said community estate may be situated.

Article 4620. Community property liable for debts

The community property of the husband and wife

shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law.

Article 4621. Community property not liable

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife except for necessaries furnished herself and children, unless the husband joins in the execution of the contract; provided, that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by this provision.

Article 4622. Funds in bank

Funds on deposit in any bank or banking institution, whether in the name of the husband or wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

Article 4623. Subject to debts of wife

Neither the separate property of the husband nor the community property other than the personal earnings of the wife, and the income, rents and revenues from her separate property, shall be subject to the payment of debts contracted by the wife, except those contracted for necessaries furnished her or her children. The wife shall never be the joint maker of a

note or a surety on any bond or obligation of a other without the joinder of her husband with her i making such contract.

Article 4624. Judgment and execution

Upon the trial of any suit as provided for in th preceding article, if it shall appear to the satisfac tion of the court and jury that the debts so con tracted or expenses so incurred were for the purposes enumerated in said article, and also that the debts so contracted or expenses so incurred were reasonable and proper, the court shall decree that execution may be levied upon either the common property or the separate property of the wife at the discretion of the plaintiff.

Article 4625. Female emancipated by marriage

Every female under the age of twenty-one years who shall marry in accordance with the laws of this State, shall, from and after the time of such mar riage, be deemed to be of full age and shall have all the rights and privileges to which she would have been entitled had she been at the time of her mar riage of full age.

Article 4626. Application to be feme sole

Any married woman, with the consent of and joined by her husband, may apply by written petition addressed to the district court of the county in which she may desire to transact business for judgment or orders of the said court removing her disabilities of coverture and declaring her feme sole for mercantile and trading purposes; such petition shall set out the

causes which make it to the advantage of said married woman to be so declared feme sole, and shall be filed and docketed as in other cases, and at any time thereafter the district court may, in term time, take up and hear said petition and evidence in regard thereto. If upon a hearing of said petition and evidence relating thereto, it appears to the court that it would be to the advantage of the woman applying, then said court shall enter its decree declaring said married woman feme sole for mercantile or trading purposes, and thereafter she may, in her own name, contract and be contracted with, sue and be sued, and all of her separate property not exempt from execution under the laws of Texas shall thereafter be subject to her debts and liable under execution therefor, and her contracts and obligations shall be binding on her.

Article 4627. Rights of persons married elsewhere

The marital rights of persons married in other countries who may remove to this State shall, in regard to property acquired in this State, during the marriage, be regulated by the laws of this State.

Article 4629. Grounds for divorce

A divorce may be decreed in the following cases:

(1) Where either party is guilty of excesses, cruel treatment, or outrages toward the other, if such ill treatment is of such a nature as to render their living together insupportable.

(2) In favor of the husband, where his wife shall have been taken in adultery, or where she shall have

voluntarily left his bed and board for the space of three (3) years with the intention of abandonment.

(3) In favor of the wife, where the husband shall have left her for three (3) years with intention of abandonment, or where he shall have abandoned her and lived in adultery with another woman.

(4) Where a husband and wife have lived apart without cohabitation for as long as ten (10) years.

(5) In favor of either the husband or wife, when the other shall have been convicted, after marriage, of a felony and imprisoned in the State penitentiary; provided, that no suit for divorce shall be sustained because of the conviction of either party for felony until twelve (12) months after final judgment of conviction, nor then if the Governor shall have pardoned the convict; provided, that the husband has not been convicted on the testimony of the wife; nor the wife on the testimony of the husband.

(6) When either the husband or wife has become permanently and incurably insane; provided, however, that no divorce shall be granted unless such insane person shall have been duly and legally adjudged to be insane and confined in a public or private insane asylum or other institution for psychopathic patients of this State, or of a sister State, for at least five (5) years next preceding the commencement of the action for divorce, nor unless it shall appear to the Court that such insanity is permanent and incurable; provided, however, that no costs shall be adjudged against an insane spouse in divorce action.

Article 4634. Debts created after suit

On and after the day on which the suit for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

Article 4635. Inventory and appraisement

At any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisement to be made of both real and personal estate which are in the possession of the husband, and an injunction restraining him from disposing of any part thereof in any manner.

Article 4636. Temporary orders

Pending suit for a divorce the court, or the judge thereof, may make such temporary orders respecting the property and parties as shall be deemed necessary and equitable.

Article 4637. Alimony

If the wife, whether complainant or defendant, has not a sufficient income for her maintenance during the pendency of the suit for a divorce, the judge may, either in term time or in vacation, after due notice, allow her a sum for her support in proportion to the means of the husband, until a final decree shall be made in the case.

Article 4638. Division of property

The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate.

Article 4639. Children

A divorce shall not in anywise affect the legitimacy of the children of the parents so divorced. The court shall have power, in all divorce suits, to give the custody and education of the children to either father or mother, as the court shall deem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the children, to be determined and decided on the petition of either party; and in the meantime to issue any injunction or make any order that the safety and well-being of any such children may require.

Article 4639a. Further provision as to children, petition, judgment

Sec. 3. The authority herein conferred upon the Court to alter, change, or supersede the provisions of judgments providing for the support of minor children, and the authority conferred upon the Court to enforce such judgments may be exercised by the Judge of said Court in vacation.

APPENDIX "D"

Digest of Texas Decisions cited by Government, alphabetically arranged.

1. *Aaron v. Aaron*, 173 S. W. 2d 310 (Tex. Civ. App., 1943) (Texas brief, p. 13).

This was a suit by a widow against her parents-in-law to recover the sum of $14,447.69, the proceeds of two life insurance policies on the life of Leon Aaron, deceased, paid to defendant Alice Aaron, his mother, by the insurance companies. In the alternative, plaintiff sought to recover one-half of the above amount, and in the further alternative, that part of the amount paid to Alice Aaron under the policies in the proportion which the amount of premiums paid out of community funds of plaintiff and her deceased husband bore to the total premiums paid.

The policies in question were taken out by the deceased prior to his marriage. After marriage, he made a gift of the policies to the community estate, and plaintiff was the named beneficiary. Following certain marital difficulties, decedent, for the purpose of defrauding plaintiff, substituted his mother as beneficiary in the policies. The Court held that decedent had no right by gift in fraud of his wife's rights to give her portion to his mother; that the policies were community property; that decedent could dispose of his half interest therein by gift to his mother; and that plaintiff was entitled to recover her half interest in the proceeds.

2. *Cushenberry v. Profit*, 153 S. W. 2d 291, (Tex. Civ. App., 1941) (Texas brief, p. 7).

Plaintiffs, collateral heirs of the deceased wife, sued defendants, children of the deceased husband by a former wife, to set aside a conveyance of community property made by said deceased husband and wife to a trustee. The husband and wife had reserved a life estate in the property with remainder over to the defendants. Judgment in the lower court was for defendants. Plaintiffs sought reversal on the grounds (1) that the instrument in question was testamentary in character, and not having been probated, was inadmissible in evidence and ineffective to pass title; (2) that because of their testamentary character, the husband could not pass title to property belonging to his wife as part of the community; and (3) that the trial court erred in excluding testimony as to the deceased wife's mental capacity.

The Appellate Court affirmed the trial court, holding that the instrument involved was not a testamentary disposition, but was a deed of conveyance, and that the husband had the power to convey the community property without joinder of his wife. Her mental capacity to contract was therefore immaterial. Plaintiffs' cause of action was held barred by limitations.

3. *Cates v. Greene*, 114 S. W. 2d 592, (Tex. Civ. App., 1938) (Texas, brief, p. 7).

A husband and wife (the Greenes) owned in community certain land, which was their rural homestead. The land was leased by them in 1930 to an oil company for oil and gas exploration, the Greenes reserving a royalty interest of one-eighth. Deferred annual pay-

ments in lieu of drilling were also provided for. Later, the Greenes conveyed a half interest in the minerals to Cates, subject to the oil and gas lease of the oil company. The conveyance to Cates was not properly acknowledged by the wife. The lessee oil company brought suit against the Greenes and Cates to determine rights to money tendered and paid into court by the company. The Greenes sought to have the conveyance to Cates cancelled as a cloud on their title and Cates sought correction of the notarial certificate on the instrument.

The Court cancelled the conveyance because homestead property was being conveyed, and the wife had not acknowledged the conveyance in the manner prescribed by law. Cates' action for correction of the notarial certificate was barred by limitation. The Court also held Cates entitled to the annual payments paid in to the date pleadings were filed in the suit by the Greenes and Cates. This was on the ground that such rentals, after accrual, were personal property which the husband could convey without the joinder of his wife. The transfer of such accrued rentals had no effect upon the wife's homestead interest.

4. *Carter v. Barnes*, 25 S. W. 2d 606, (1930) (Texas brief, p. 13).

This was a suit between heirs of the husband and the grantee of the wife to determine the title to certain real property. The husband had abandoned the wife, and she, with money thereafter earned by her, purchased the property in question. She later conveyed it to the defendant. The heirs of the husband sued

to recover a half interest therein. Incompetent evidence was allowed to be introduced as to the time of the death of the husband. The lower courts rendered judgment for plaintiffs.

The Supreme Court reversed and remanded the cause. It was held that the property in question was community property; that the abandoned wife had the right, during the existence of the marriage relation, to make a valid conveyance of the community property; that if the conveyance to the defendant by the wife was prior to the dissolution of the marriage relationship by death or otherwise, defendant's title was good. Otherwise, plaintiffs were entitled to recover. The trial court erred in refusing to exclude the incompetent testimony as to the date of the husband's death.

5. *Crowder v. Crowder*, 111 S. W. 2d 1161, (Tex. Civ. App., 1937) (Texas brief, p. 12).

This was a suit by the wife against her husband and their daughter to eject the daughter from land constituting the community homestead of the husband and wife. The suit was predicated on offensive conduct by the daughter toward her mother. The father and daughter alleged that the daughter's conduct was occasioned by the mother's fault and provocation. The case was tried to a jury, but, after the submission of the evidence, the trial court instructed a verdict for the plaintiff.

The Appellate Court reversed and remanded the cause, holding that before a married woman is authorized to sue concerning community property, with-

out being joined by her husband, she must show that her husband, though he refuses to join her, is at fault in his management and control of such property, or that he has abandoned her, or that his management and control were antagonistic to her homestead rights. Where, as here, the husband pleads that the obnoxious conditions and conduct of which she complains as denying her the peaceable enjoyment of their common homestead were brought about by her own misconduct, then an issue was made as to her right to sue alone that should have been submitted to the jury, there being conflicting evidence.

6. *Cowan v. N. O. Nelson Manufacturing Company*, 34 S. W. 1045, (Tex. Civ. App., 1896) (Texas brief, p. 9).

Husband and wife sued to enjoin the sheriff from selling certain real estate under an execution of the Nelson Manufacturing Company on a judgment rendered against the husband. The plaintiffs claimed the property was the wife's separate property. The trial court found the property to be community property and held for defendants. The Appellate Court affirmed.

7. *Dunn v. Vinyard*, 234 S. W. 99, (Tex. Civ. App., 1921), affirmed 251 S. W. 1043 (1923) (Texas brief, p. 10).

This was a suit by the legatee under the wife's will against the legatees under the husband's will to partition the property formerly belonging to the community estate of the deceased husband and wife. The plaintiff also prayed that in making the partition, there should be taken into account advancements

made during his life by the deceased husband to his children. The husband had died first. In his will he sought to dispose of the entire community estate. The Court found that the wife had not elected to take under the will and hence her half of the community remained in her. The partition was granted. The Court refused to require an accounting for the advancements made by the husband during his life to his children since the husband had the right to dispose of the community property as long as it was not for the purpose of defrauding his wife. Here, no contention was made that the advancements were made for that purpose.

8. *Dixie Motor Coach Corporation v. Watson*, 138 S. W. 2d 314, (Tex. Civ. App., 1940) (Texas brief, p. 12).

A wife sued for personal injuries sustained while riding one of defendant's coaches. She joined her husband "pro forma" in the suit. The Court held that the husband had to bring the action in the absence of evidence of refusal by him to bring such action. Being a "pro forma" plaintiff did not comply with this rule.

9. *First National Bank of Brownwood v. Hickman*, 89 S. W. 2d 838, (Tex. Civ. App., 1935) (Texas brief, p. 6).

Suit by creditor against husband upon a promissory note. The husband's divorced wife was joined as defendant and the creditor sought to hold her personally liable for the note, on the ground that it was a debt of the community estate, and that she

had received in partition of the estate property in excess of the note which she had appropriated to her own use. The creditor also sought to subject to the payment of the note property still in her hands, which she had received in the partition. The wife claimed a $5,000 indebtedness of the community to her individually, which, in case of any recovery against her, she sought to have made a first charge against the community property which she received in the partition.

The Court held that the wife was entitled to offset her claim against the value of the property partioned to her other than that upon which the bank sought to establish a lien; that the excess, if any, was to be applied to the bank's claim; if a deficit, to be a first charge against the property still in her hands and that the bank was to have an equitable lien on the property still remaining in her hands, subject to the foregoing.

10. *Foster v. Hackworth*, 164 S. W. 2d 796, (Tex. Civ. App., 1942) (Texas brief, p. 14).

Hackworth sued Mrs. Foster on a note and on an open account, joining her husband, Linden Foster, pro forma. An attachment was issued and levied upon a Chevrolet truck. Later, by amended petition, Linden Foster was also sued, it being alleged that he joined in the execution of the note and in the purchase of the material and labor represented by the open account; that the truck was the community property of the Fosters; and praying for a foreclosure of the attachment lien on the truck. Lin-

den Foster plead that the note and account in sui were his wife's debts and that the truck was hi separate property, not subject to his wife's debts Judgment was rendered against Mrs. Foster for the debt and against her separate property and against both the Fosters on the note and account and against their community property; it being further decreed that the attached truck was community property; and that the attachment lien thereon was foreclosed. No appeal was taken from the judgment against Mrs. Foster.

Mrs. Foster had inherited a business from her father. Mr. Foster was the manager of the business. The parties expressly stipulated that the note was signed by Mr. Foster as manager of the business and not in his individual capacity. The debt on open account was incurred for the wife's business by Mr. Foster at his instance and request.

The Appellate Court held that a married woman may have her husband act as her agent in making any contract which the law authorizes her to make. As agent, the husband is not personally liable for a debt so incurred unless he has, expressly or impliedly, incurred the responsibility. Since the parties expressly stipulated that the note was signed by the husband only as manager of the wife's separate business, the parties did not intend to bind the husband, but only the wife and her business. Since, also, the note was not incurred for necessaries, the community property cannot be subjected to its payment. The lower court's judgment as to the lia-

bility of Mr. Foster and the community property on the note was reversed.

As to the open account, the Appellate Court held that where the husband contracts a debt for his wife's separate business enterprise, or her separate estate, that if he is authorized to act for the wife, as here, not only are the wife and her separate estate, but the husband and their community property are also bound. The husband is regarded as having impliedly joined in the execution of the contract and the liability of the community property for the contract is established.

The truck, being bought on credit, was held to be community property.

The lower court's judgment as to the liability of Mr. Foster and the community property for the open account was affirmed.

11. *Gonzales v. Gonzales*, (1927) 117 Tex. 183 (Texas brief, p. 7).

The defendant had abandoned his wife, the plaintiff, and had refused to provide her any means of support. Plaintiff paid out of her separate funds and estate for necessaries for herself, the total sum of $196.00, which, upon demand, he had refused to repay. She brought suit against her husband for this amount.

The Court held that marriage creates a status, and with respect to such things as here involved, the rights of the parties are not contractual, but are only such as the law prescribes. The State has the

sole right to prescribe the incidental powers of the parties. It has provided remedies for support incidental to a divorce suit and it has decreed that during marriage the wife is the husband's agent to acquire necessaries for herself and her children and to make the community property and his separate estate liable for the debts thus contracted. Refusal of the husband to provide such necessaries is made a criminal offense. The remedies are exclusive. Here, the wife invoked no remedy given her by law nor did she use the "agency" provided by statute to relieve her needs. Instead, she voluntarily used her separate funds for support and then sought reimbursement from the community estate, or the husband's separate estate, through a direct action to that end, independent of, and in the absence of, a divorce proceeding. Her effort is to compel support by the husband in a way different from that prescribed by law and contradictory to the relevant statutory provisions. Plaintiff stated no cause of action and had no suable capacity in the circumstances.

12. *Griffin v. Troup Independent School District*, 163 S. W. 2d 412, (Tex. Civ. App., 1942) (Texas brief, p. 7).

Suit in trespass to try title to land. The husband, acting as guardian of his insane wife, conveyed an acre of land belonging to their community estate to the school district, the plaintiff. The defendant, the husband, while admitting that the conveyance was good as to his half thereof, claimed that the guardian deed was void because the husband was not

the guardian at the time of the deed. The land was not homestead property.

The Court held the conveyance was valid, irrespective of the husband's qualification as guardian of her estate, since the husband had full authority to convey the community property without the joinder of his wife.

13. *Gist v. Tsesmelis*, 153 S. W. 2d 277, (Tex. Civ. App., 1941) (Texas brief, p. 8).

The wife sued the defendants for the price of meals served at a cafe operated by her. Her husband was joined pro forma as plaintiff, but he actively participated in the trial. Plaintiff obtained a judgment in the lower court and the sole ground urged for reversal was that plaintiff was a married woman, the suit was for community property, and can be maintained only by the husband. This issue, being raised for the first time in the Appellate Court, must be deemed to have been waived. Moreover, the husband actively participated in the trial and would be estopped by the judgment from further asserting the same claim against the defendants. The judgment was affirmed.

14. *Hall v. Aloco Oil Company*, 164 S. W. 2d 861, (Tex. Civ. App., 1942) (Texas brief, pp. 9 and 12).

Ethel Hall sued various owners of the fee, mineral, royalty, and leasehold estates in certain land for the title and possession of one-half thereof. The property in question had been part of the community estate of Ethel Hall and her later divorced husband.

It was not their homestead. The husband had abandoned Mrs. Hall and left the State. He was sued by a creditor, she not being joined, on a community debt. Judgment was obtained and the property in question was sold on foreclosure of an attachment lien to the predecessor in title of the present defendants.

The Court held that plaintiff was not entitled to recover since the court having jurisdiction of the property could subject it to payment of the community debts without the wife's joinder. The wife was bound by a judgment against her husband, whether he was plaintiff or defendant, though she was not a party in name to the proceedings. This is based upon the doctrine of virtual representation in that the husband is by law made the representative of her interest. The fact that he had abandoned her does not alter this rule since, in such case, while the wife may manage and dispose of the community property for the support of herself and family, the husband has a concurrent right to dispose of such property.

15. *Harris v. Prince*, 132 Tex. 231 (1938) (Texas brief, p. 11).

Mrs. Harris, without joinder of her husband, signed Articles of Association of what was known as "Lloyds of Texas." Under said Articles, she was required to contribute a certain amount of cash and securities into a surplus fund, which was made liable for payment of losses. No individual liability existed beyond the amount so contributed to the surplus. Mrs.

Harris thereupon, without joinder of her husband, endorsed a certificate of paid up shares in a building and loan association and delivered it to the surplus fund. On insolvency and dissolution of the Lloyds of Texas, the receiver sued Mrs. Harris and her husband to divest her of all title to the building and loan stock and to have it declared a part of the surplus funds of Lloyds of Texas, to be used in satisfying the claims of creditors of said concern.

The Court held against the receiver and for the Harrises, directing delivery of the stock to Mrs. Harris. It was held that a married woman can contract only in the manner and under the conditions prescribed by law. There was no provision of law permitting a married woman to execute contracts of insurance and thereby bind herself or her separate estate. The signing of the Articles of Association created the alleged liability and the endorsement of the stock was simply to guarantee such liability as might come into existence under such Articles. The assignment of the stock created no liability aside from said Articles. It was immaterial, therefore, whether the stock was validly assigned or not.

16. *Hornsby v. Hornsby*, 127 Tex. 474 (1936) (Texas brief, p. 9).

Pending a divorce action, the husband filed a voluntary petition in bankruptcy in the United States District Court. He was adjudged a bankrupt on March 25, 1931 and was granted a divorce on April 13, 1931. The divorce court made no disposition of the community property. Certain community property was or-

dered sold by the bankruptcy court and same was sold by the trustee to the husband's father.

The divorced wife sued to remove the cloud so created on her title to the lands. She claimed that on the date of their final separation, she and her husband had orally divided and partitioned their community property.

The Court held that the bankruptcy sale passed title to the property since the trustee was vested by operation of law to all property which the bankrupt himself could have transferred or which might have been levied upon, prior to the filing of the petition. The rights of creditors could not be defeated by agreements between husband and wife.

The case was remanded for retrial to determine whether the property was the homestead of the former spouses. If it was, then title thereto did not pass to the trustee in bankruptcy under the express provision of the Bankruptcy Act, and the wife would not be bound by any adjudication by the court of bankruptcy on the homestead question.

17. *Hedtke v. Hedtke*, 112 Tex. 404 (1923) (Texas brief, p. 17).

This was a suit for divorce, division of property, and determination as to which of the parties should have custody of the minor children of the marriage. The community property consisted of personalty only, which was equally divided among the spouses. The husband owned two tracts of land as his separate property. The lower court decreed that the wife

should be granted and allowed a homestead for herself and her two minor children during the wife's life to one of the tracts of land owned by the husband as his separate property. The Court of Civil Appeals, being in doubt as to the lower court's power, thus to fix the rights of the parties in the realty in question, certified to the Supreme Court the question of the lower court's authority in this regard.

The Supreme Court answered by sustaining such authority in the lower court under the applicable statutes. It held that the court pronouncing a decree of divorce is invested with wide discretion in disposing of any and all property of the parties, separate or community, and that its action, in the exercise of such discretion, should be corrected on appeal only where an abuse of discretion is shown in that the disposition made of some property is manifestly unfair or unjust.

18. *Humbles v. Hefley-Stedman Motor Company*, 127 S. W. 2d 515 (Tex. Civ. App., 1939) (Texas brief, p. 11).

Mr. and Mrs. Humbles signed a promissory note, naming the motor company as payee, in part payment of a truck purchased from said motor company. The truck was bought to enable the husband to engage in a business enterprise in which the wife had no part. The motor company sought judgment on the note against the wife so as to charge her separate estate, on the theory that the truck came within the meaning of the statutes authorizing a married woman to contract for "necessaries furnished" to herself and her children.

The court held that the truck, under such circumstances, did not constitute "neeessaries furnished" to the wife and the children under the applicable statutes, and, accordingly, she was not personally liable for the purchase price thereof.

19. *John F. Grant Lumber Company v. Jones*, 139 Tex. 647 (1942) (Texas brief, p. 11).

Mrs. Jones, prior to marriage, had executed a promissory note to plaintiff. Mrs. Jones became married and during marriage, without the consent or joinder of her husband, and when the debt was more than four years past due, executed a promissory note in plaintiff's favor renewing the pre-existing debt. Plaintiff sued Mr. and Mrs. Jones on said promissory note.

The Court held that this was not one of the cases provided by statute where a married woman may make a binding contract. The renewal note imposed no legal liability either on her or her husband. She was liable on the original debt, but the enforcement thereof was barred by limitation.

20. *Kearse v. Kearse*, 262 S. W. 561 (Tex. Civ. App., 1924) affirmed 276 S. W. 690 (1925) (Texas brief, p. 13).

This was an action by a widow against certain of her children over the title to two tracts of land composed of 66 acres and 80 acres, respectively. The decedent husband had purchased the entire acreage for cash and on credit. Before the property was paid for the spouses separated. A daughter purchased the notes from the vendor and the parents conveyed

same to her in consideration of the cancellation of the notes. After the spouses had separated, the daughter sold and conveyed the land to her mother for a consideration of $3,100.00, which was never paid. The mother, joined by her separated husband, reconveyed 80 acres of the tract to the daughter in cancellation of the debt, and the mother retained 66 acres. The daughter then conveyed the 80 acres to her father by mesne conveyances. The father died later and granted a life estate in the full 146 acres to an incompetent daughter, with remainder in fee to a son. The son entered into an agreement with his mother providing in effect that she was to have 66 acres as her separate property; that the incompetent daughter should have a life estate in the 80 acres, with the remainder in fee to the son.

The mother, being dissatisfied with this agreement, brought suit to cancel the agreement; to establish her title to the 66 acres as her separate property; and to establish her community title to one-half of the 80 acres.

The Court held that the 66 acres being acquired by the mother during marriage, even though after the separation, constituted community property; that the agreement was null and void since illegally contracting away the rights of the incompetent daughter and being made by the mother under duress, and that the 80 acres were likewise the community property of the spouses.

21. *Keith v. Allen*, 153 S. W. 2d 636 (Tex. Civ. App., 1941) (Texas brief, p. 10).

Defendant, while married, and without her husband's joinder, executed an unsecured note in favor of her mother. Later defendant and her husband were divorced. Upon the death of the mother, the administrator of her estate sued the defendant on the note.

The Court held that since there was no evidence showing that defendant had been abandoned by her husband at the time the note was executed; that they were permanently separated, or that her disabilities as a married woman had been removed at the time of the execution of the note; or that the proceeds of the note were used by defendant for necessaries for herself or her children, or for the benefit of her personal estate, judgment must be for defendant.

22. *Lee v. Hall Music Company*, 119 Tex. 547 (1931) (Texas brief, p. 10).

Suit on a note executed by a married woman whose husband was, at all times material, confined to an insane asylum. No showing was made of the purpose for which the notes were executed. The lower courts rendered judgment for plaintiff.

The judgment was reversed and the cause remanded. The mere fact that a husband is insane does not of itself enlarge the powers of the wife to contract, except with respect to community property, if the husband has no separate property and there be no children, nor does it impair her power to contract in other respects authorized by the statutes. For plaintiff to prevail, he must show that Mrs.

Lee executed the note for necessaries for herself or children, or for the benefit of her separate estate, or in the management and control of the community property. The fact of the husband's insanity renders it unnecessary to join him as a defendant in the suit.

23. *Loan Association v. Abernathy*, 129 Tex. 379 (1937) (Texas brief, p. 11).

Suit for balance due on a note against husband and wife. The note was signed by the husband as a formal requirement only and the parties expressly agreed that Mrs. Abernathy was to pay the note out of her separate funds and estate, and no community funds were to be paid on the note. The note was executed by the spouses in order to pay off a judgment lien against the separate property of Mrs. Abernathy.

The Court held that the wife has power to contract so as to bind herself and her property for the purpose of preserving and benefiting her separate estate. She was, therefore, liable on the note. The husband was held not liable because of the agreement made by the creditor to look only to the wife and her property for payment.

24. *Locke v. Locke*, 143 S. W. 2d 637 (Tex. Civ. App., 1940) (Texas brief, p. 8).

Suit for debt and an accounting by divorced wife against her former husband. They were permanently separated in 1930, but not divorced until 1937. The divorce court decreed a one-half interest in the community property to each spouse. In this action, plain-

tiff alleged that defendant had accumulated earnings between 1930 and 1937, and that he had accumulated cash surrender values of life insurance policies, the premiums of which were paid with community funds. The lower court awarded her (1) one-half the cash surrender values of the policies; (2) one-half the amount found by the jury to have been withdrawn by the defendant from the community funds in excess of his living expenses and sums expended for the community property; and (3) attorney's fee.

The Appellate Court affirmed the action of the lower court as regards the cash surrender value of the policies but reversed on the excess withdrawals and attorney's fee awards. The Court held that the expenditures by defendant were not shown to be on fraud of the wife, a necessary prerequisite to recovery on this item. No legal authority existed for charging defendant with attorney's fee in this action, which was later and independent of the divorce action.

25. *Lovejoy v. Cockrell*, 63 S. W. 2d 1009 (1933) (Texas brief, p. 9).

Suit to recover title to an undivided half interest in five acres of land. The property in question had been part of the community estate of plaintiff, the widow, and her deceased husband. The property had been sold by the independent executor of the husband's estate to defendant for the purpose of paying community debts incurred during decedent's lifetime.

The Court held for the defendant. The community property was subject to the payment of community debts. The independent executor had the same power to deal with the property as the probate court, which could have ordered it sold in payment of community debts.

26. *Lusk v. Parmer*, 114 S. W. 2d 677 (Tex. Civ. App., 1938) (Texas brief, p. 11).

Mr. and Mrs. Parmer purchased property and executed notes therefor. It was intended that the property be Mrs. Parmer's separate property, but the deed failed to contain the necessary recitations to effectuate this intent. However, Mrs. Parmer, believing the property to be her own, paid the notes out of her separate estate. Plaintiff, Lusk, in the meantime, obtained a judgment against Mr. Parmer and sought to enforce his judgment lien against the property above mentioned. Mrs. Parmer plead that the property was her separate property, not subject to her husband's debts and alternatively, that, if she be mistaken, she was entitled to be reimbursed and subrogated to the lien retained by the vendors and to all rights, legal and equitable, reserved or created by said lien because she had paid the debt incurred out of her separate funds.

The Court held that the property was community property and that Mrs. Parmer, having a one-half interest therein, and having in good faith paid the debt out of her separate funds, was subrogated to the rights of the owners of the notes, notwithstanding she was mistaken as to the title of the property

and the interest she held therein. The judgment creditor's lien was not entitled to priority, since he does not stand in the same position as an innocent purchaser for value.

27. *Mahoney v. Snyder*, 93 S. W. 2d 1219 (Tex. Civ. App., 1936) (Texas brief, p. 12).

Plaintiff, the wife, sued her separated husband and other individuals to whom he had conveyed community property seeking to have her undivided half interest in the property established and partitioned. The lower court found that the conveyances by the husband were wrongful and void and that the properties still belong to the community estate of plaintiff and her husband. The conveyances and deeds were cancelled and held for naught, and the defendants were ordered to make proper transfers to the husband. The court refused to partition the property.

The Appellate Court affirmed, holding that the wife, where separated from her husband, could sue him and his vendees or transferees to cancel his deeds and other conveyances of community property, when the object of her suit is to prevent waste and dissipation of the property and to protect her undivided one-half interest in the community property. As long as the marital status continued, there could be no partition of the property since the community estate is a legal incident to the marriage status of the parties. The Court also held that any future effort on the husband's part to dispose of the property would be futile, and by a proper proceeding, Mrs. Mahoney could enjoin the disposition of it.

28. *McJunkin v. Republic National Bank of Dallas*, 131 S. W. 2d 1085 (Tex. Civ. App., 1939) (Texas brief, p. 8).

This was a suit to obtain construction of a will. The question was whether the husband's will had attempted to dispose of all the community property so as to require an election by the wife as to whether she would take under the will or not. The Court, construing the entire will and its provisions, held that it passed the entire community estate and that the wife had elected to take under it.

29. *Moody v. Smoot*, 78 Tex. 119 (1890) (Texas brief, p. 8).

Moody, as administrator of the deceased wife's estate and as next friend of her two minor children, sued the surviving husband and others to enjoin the sale of a stock of cattle alleged to belong in part to the community estate of the deceased wife and her surviving spouse, and in part to her separate estate. It was alleged that the surviving husband after his wife's death had executed a mortgage upon the cattle to secure a note given to the bank for money borrowed, not to pay community debts but for his own individual use, and that the trustee was about to sell the property. After the sale, plaintiff prayed for recovery of the community cattle from the purchaser and of the decedent's separate cattle, or judgment for their value if these could not be found. A demurrer to the petition was interposed, one of the grounds being that plaintiff, as administrator of the wife's estate, had no right to the possession or con-

trol of the property which had belonged to her and her husband in common. The demurrer was sustained by the lower court.

The Supreme Court held that the husband, upon the death of the wife, occupied the relation of a surviving partner, in an ordinary partnership. He was liable for all the debts of the partnership, and it was but reasonable that he should have the right to administer the common property for the payment of common debts without interference on the part of her legal representative. Accordingly, it was held that the administrator had no right to prosecute the suit as to so much of the property as was the community property of the spouses. His right, however, to prosecute the suit for recovery or protection of the deceased wife's separate property was clear.

The Court also held that the minor plaintiffs could bring the suit to protect their interest in the community property. Their father held one-half interest in that property in trust for them, subject to the payment of community debts. The facts alleged in the petition showed a breach of trust and a fraud upon them; and they had the right upon proof of the allegations to restrain the sale, or, after sale, to recover of anyone who participated with knowledge of the facts.

The judgment was reversed and the cause remanded.

30. *Moore v. California-Western States Life Insurance Company*, 67 S. W. 2d 932 (Tex. Civ. App., 1934) (Texas brief, p. 13).

Suit over proceeds of insurance policy on life of I. S. Moore, decedent. The insurance company admitted liability but requested the court to determine whether the proceeds were payable to the widow of I. S. Moore or to his mother, who was the named beneficiary in the policy. The policy had been taken out by I. S. Moore, after he had deserted his wife, and his mother was named as beneficiary. The premiums were paid from community funds. The jury found that I. S. Moore had named his mother as beneficiary in the policy to defraud his wife of her interest in their community estate. Judgment was rendered for the widow of I. S. Moore.

The Appellate Court affirmed, after reviewing the evidence and finding same sufficient to support the jury's finding. The controlling rule of law was that the husband has no right to dispose of community funds in fraud of the wife's rights.

31. *Myles v. Arnold*, 162 S. W. 2d 442 (Tex. Civ. App., 1942) (Texas brief, p 7, fn. 1).

Suit by widow against executors of her deceased husband's estate to recover sums alleged to be due under a separation agreement between plaintiff and decedent and to establish and foreclose an equitable lien therefor on certain property in defendants' hands. The agreement in question provided for separation of the parties; that plaintiff's earnings would be her separate property; and that decedent would pay her $200.00 per month for life. The parties continued to live together for a time after the agreement and there was no evidence that there had been a separa-

tion with the intention to remain premanently apart prior to or at the time the contract was made.

The Court held for the defendants, denying recovery by the plaintiff. The contract sued upon was void because it attempted to enlarge the wife's estate by making her earnings her separate property, contrary to the constitution and statutes of Texas. It was also void as against public policy since a separation agreement to be valid must be made where there has been a separation with the intention of remaining permanently apart. A contract between husband and wife to separate in the future is contrary to public policy and void.

32. *Ochoa v. Edwards*, 189 S. W. 1022 (Tex. Civ. App., 1916) (Texas brief, p. 9).

Suit by husband and wife to enjoin the sheriff from selling certain lots levied upon under an execution issued upon a judgment rendered against the husband and two others. The lots levied upon were acquired by the spouses in the following manner:

Mrs. Ochoa owned a half interest in a tract of land and the community owned the other half interest therein. This tract was conveyed to a purchaser in consideration of $9,000 cash, $5,450 notes payable to Mr. Ochoa, and two lots (the ones in question) conveyed to Mrs. Ochoa. There was a house on the lots at the time of the conveyance. Later a house was built thereon with community funds. The lot was worth $5,000.00 at time of execution and the houses, $3,000.00 each. The jury found that there was no intent or agreement that the lots would

constitute Mrs. Ochoa's separate property at the time of conveyance to her.

The Court held that where property is purchased in part with the separate estate of the wife and partly with community funds, the wife has a separate interest in it proportionate to the amount her separate estate contributes toward the purchase money. This is the rule where realty is conveyed to the wife, and there is nothing upon the face of the deed to show that it is conveyed to her as her separate estate and there is no agreement between the parties that such property should be her separate property. Consequently, the wife owned in her separate right one-half ($2,500) the land and one-half ($1,500) the building on it at the time of the conveyances. The community owned the balance ($7,000.00). The Court enjoined the defendant from selling more than a seven-elevenths interest in the property.

33. *Petersen v. Berry*, 99 S. W. 2d 1025 (Tex. Civ. App., 1937) (Texas brief, p. 11).

Plaintiff, a physician, sued defendant, the surviving widow of Roy P. Berry, deceased, to recover the sum of $500.00 which he alleged to be a reasonable charge for medical services rendered Berry during his lifetime.

There existed no community property nor separate estate of Roy Berry. Defendant did have a separate estate against which plaintiff sought recovery. Plaintiff contended that the wife's separate estate was bound since she was authorized by statute to contract "for necessaries furnished her or her children."

The Court held that this contractual power was for necessaries of the married woman and her children and not for her husband. The duty to support his wife and children rests upon the husband. The wife is under no legal obligation to maintain the husband out of her separate estate, and her estate cannot be charged with necessaries for him. Judgment for defendant was affirmed.

34. *Roberts v. Magnolia Petroleum Company*, 142 S. W. 2d 315 (Tex. Civ. App., 1940) (Texas brief, p. 8).

Plaintiff, the wife, joined by her husband "pro-forma," sued defendant for injuries sustained in an accident with one of defendant's employees, who was also made a defendant. The husband of plaintiff had, for a consideration, executed a release to the defendant employee for the damages occasioned by the accident. After the evidence was in, the lower court instructed a verdict for defendants.

The Appellate Court affirmed. It held as to the defendant employer that the undisputed evidence showed the employee was not engaged in pursuit of its business at the time of the accident. As to the defendant employee, the court held that a husband alone may sue for damages to a married woman for personal injuries, such damages being community property. A person joined "pro forma" is not a real party at interest in the litigation. The wife, having made no allegation that her husband had refused to become a real litigant or party plaintiff, could not maintain the suit. Judgment was affirmed.

35. *Savage Oil Company v. Johnson*, 141 S. W. 2d 994 (Tex. Civ. App., 1940) (Texas brief, p. 12).

Plaintiff, a married woman, sued defendant to recover on a note given for rent and to foreclose a landlord's chattel mortgage. Among other defenses, defendant claimed inability of plaintiff to sue alone, she being a married woman. Plaintiff recovered in the lower court.

The Appellate Court affirmed the lower court, reforming the judgment as to the amount of the recovery. The Court held that plaintiff, having been abandoned and deserted by her husband, could bring suit to recover the rents, even though they be community property.

36. *Seabrook v. First National Bank*, 171 S. W. 247 (Tex. Civ. App., 1914) (Texas brief, p. 9).

Suit on a note. Defendants answered and prayed that one W. C. Noble be made party defendant. Demurrers to the answer were sustained and judgment rendered for plaintiff. On motion for new trial, defendants assailed the judgment of the trial court on the ground of disqualification of the judge, on the ground that the judge's wife and W. C. Noble's wife were first cousins. Motion for new trial was overruled.

The Appellate Court reversed and remanded the cause. The judge's wife and Mrs. Noble being related within the third degree, if Mrs. Noble's interest in the community estate of herself and husband would be affected by a judgment against him, the

trial judge was disqualified. Mrs. Noble's interest would be affected by a judgment against Noble, as it would be a charge upon the community property of Noble and his wife, because she, within the spirit and intent of the Constitution and the statute, would be a party to the suit.

37. *Shaw v. Shaw*, 28 S. W. 2d 173 (Tex. Civ. App., 1930) (Texas brief, p. 10).

This was a contest between the son of deceased and his mother, the widow, over the right to certain certificates of deposit and Liberty bonds. Prior to his death, decedent gave said certificates and bonds to his son. The widow claimed a one-half interest therein as community property. The jury found that the certificates and bonds were not given to the son by deceased for the purpose of defeating the wife's interest therein, if any. The widow had deserted her husband and had married another prior to the time the deceased earned the funds represented by the certificates and bonds. Judgment was rendered for the son.

The Appellate Court affirmed. No error of law was committed by the judgment since the presumption is that the widow, prior to remarriage, had secured a divorce from the deceased. The funds being earned thereafter would not be community funds. Nor, as a matter of law, was decedent unable to give the certificates and bonds to his son, it having been found by the jury that this disposition by the decedent was not made with intent to defraud the wife.

. *Starr v. Schoellkopf Company*, 131 Tex. 263 (1938) (Texas brief, p. 8).

In 1918, G. H. Schoellkopf filed suit in the statu-ry form of trespass to try title to 177 acres of land. ul Starr and his wife were made defendants. Judg-ent was for plaintiff against Paul Starr, the wife t being mentioned in the judgment. Later, Paul arr obtained a deed to the land from one Williams o had no title thereto, and took possession. G. H. hoellkopf had transferred the land to the Schoell-pf Company and it brought this action against e Starrs in the nature of trespass to try title. By pplemental petition, the prior judgment was pleaded res judicata. The lower court rendered judgment r defendants on the ground that the former judg-ent did not dispose of Mrs. Starr. The Court of vil Appeals reversed.

The Supreme Court affirmed the Court of Civil peals. In trespass to try title, plaintiff neces-rily had to prove and the Court find that he had e superior title to the land. The action involved mmunity property and the judgment against the sband would include the wife even if she were a party to the action. No proof being offered e that Williams had any title to the land, and first judgment necessarily including a finding t Schoellkopf had superior title to the land, his nsferee was not here required again to prove title m the sovereignty of the soil.

39. *Strickland v. Wester*, 131 Tex. 23 (1938) (Texas brief, p 7, fn. 1, and p. 9).

Suit by a judgment creditor of the deceased husband against his surviving wife to cancel a deed executed by the deceased husband to his wife, after the judgment against the deceased husband had been obtained. The evidence showed that the wife had purchased the lot from her husband with her own earnings, which she and her deceased husband had agreed should be her separate property. The trial court rendered judgment for plaintiff. The Court of Civil Appeals reversed and remanded the cause for a new trial on the ground that an issue of fact as to a gift by the husband to wife of her separate earnings had been raised.

The Supreme Court affirmed the Court of Civil Appeals. It held that the agreement that the wife's earnings would be her separate property was void; that while her earnings as such, though community property, would be exempt from debts contracted by her husband, when such earnings are converted into other property, that property becomes subject to the payment of debts contracted by the husband the same as any other community property. The husband could make a gift of her earnings to her after they were earned and there was sufficient evidence for submission of this fact to the jury. If the money was given to her, then the evidence raised an issue of fact as to whether the conveyance to her was fraudulent.

40. *Ulmer v. John Hancock Mutual Life Insurance Company*, 161 S. W. 2d 862 (Tex. Civ. App., 1942) (Texas brief, p. 11).

Suit to recover land. The husband, while insane, and his wife, the plaintiffs, had executed an extension agreement covering community property that was subject to a lien for the debt extended. Later, the land was sold under the lien.

The Court held that, irrespective of the husband's unsoundness of mind, the extension agreement was valid since the wife succeeded to the power to make a contract for the preservation of the community property. The property was subject to sale to satisfy a community debt, the payment of which was in default. The extension agreement rendered such property not subject to sale for a time, at least. That effect of the extension agreement was to preserve the community property.

No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,
Appellant,
HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED,
Appellee.

On Appeal From the District Court of the United States For the Western District of Texas.

MOTION OF HOBART HUSON FOR LEAVE TO FILE AMICUS CURIAE ARGUMENT and ARGUMENT OF AMICUS CURIAE

HOBART HUSON,
Attorney and Counsellor.

MPLN REMARKS RIFUGIO TEXAS 12 28 45 9003

No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA,
Appellant,

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED,
Appellee.

On Appeal From the District Court of the United States For the Western District of Texas.

MOTION OF HOBART HUSON FOR LEAVE TO FILE AMICUS CURIAE ARGUMENT.

To the Honorable Supreme Court:

Comes Hobart Huson, a practicing attorney at the bar of the State of Texas and a duly admitted attorney and counsellor of the Supreme Court of the United States, and verily believing that the decision of the Court in the above captioned case is fundamentally erroneous and that if certain grounds which are raised by

the record but have not been particularly pointed out in briefs of counsel, were brought to the attention of the Court, that it would reconsider its decisions and holdings in the case at bar and affirm the judgment of the lower courts, respectfully asks leave of the Court to file, as **amicus curiae,** the attached and accompanying argument as such **amicus curiae.**

Respectfully submitted,

HOBART HUSON,
Attorney and Counsellor
Refugio, Texas.

No. 59

IN THE

Supreme Court of the United States

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THE UNITED STATES OF AMERICA,
Appellant,
HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNEST HERBST, DECEASED,
Appellee.

On Appeal From the District Court of the United States For the Western District of Texas.

ARGUMENT OF AMICUS CURIAE

To the Honorable Supreme Court:

The law of Texas appears to be that a man may live in open or in quasi adultery with a woman, and still the woman will be treated as a partner insofar as property accumulated by joint efforts is concerned. Where contribution

is established, in the absence of showing the extent thereof, it is presumed that the woman is entitled to one-half. If there be an agreement as to the share she is to receive, she is entitled to the agreed share. If deeds be taken in the joint names she is entitled to an equal one-half without further inquiry. Should the relationship approximate the dignity of a putative marriage, the woman is entitled to one-half of the joint accumulations, irrespective of the extent of her actual contribution.[1]

A clear distinction is made between the nature of property accumulated jointly under the circumstances mentioned and that accumulated by spouses during existence of lawful marriage. Goods jointly accumulated during the illicit or quasi-illicit relationship are **not** com-

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1. **Chapman v. Chapman,** (Civ. App.) 41 S. W. 533 (535) W. E. Refused.
Morgan v. Morgan, (Civ. App.) 21 S. W. 154 (155-156)
See **Harris v. Hobbs,** (Civ. App.) 54 S. W. 1085, wherein it is intimated the woman would be entitled to an agreed share.
Lee v. Lee, 112 Texas, 392, 247 S. W. 828.
Barkley v. Dumke, 99 Texas 150, 87 S. W. 1147.
Lawson v. Lawson, (Civ. App.) 69 S. W. 246, W. E. Refused.
Hammond v. Hammond, (CCA) 108 S. W. 1024, W. E. Refused.

munity property, technically speaking, but are **partnership** property; the respective undivided interests being separate estates. It is held that the woman's share is not subject to execution for individual debts contracted by the man.[2]

Hence, if either of a couple living in such illicit or questionable relationship should die, it is inconceivable that the Federal Estate Tax could be extended to include the share of the surviving partner; irrespective of which (if either) had been the active manager.

Such being the case, the practical effect of the provision of the Act under scrutiny, as construed by this Court, is to extend the Estate Tax in cases where an honorable and legal marital relationship exists, although it could not be extended in cases where a legal marriage did not exist. Can it be gainsaid that, under the Court's construction, the tax liability attaches to the entire estate solely because a lawful marriage exists? It is indeed difficult to escape the conclusion that a harsh penalty has been imposed on lawful marriage.

In an ordinary commercial partnership, it is not unusual for the managing partner to be

2. **Little v. Nicholson**, (Civ. App.) 187 S. W. 506 (508).

vested with a control over the firm's business and assets sometimes as broad as that of the husband in a ganacial partnership. Certainly it cannot be the law that if such a managing partner dies, the interests of his partners must be included in the decedent's estate, on the theory that the surviving partners receive a benefit from the managing partner's death by reason of termination of his management and control. The only distinction between such a commercial partnership and a ganacial partnership is the element of marriage. Hence the liabilities of the Act under consideration actually attach because of the marital relationship, and not because of the control.

It is submitted that any law striking at the institution of marriage is contrary to a sound Public Policy, in this country. It is, of course, realized that this Court cannot inquire into the policy of Congress in enacting the legislation in question, but it has been held by this Court that it **may** inquire whether the action of Congress is arbitrary or capricious. **Norman v. Baltimore & Ohio Railroad Co.,** 294 U. S. 240, 79 L. Ed. 885. The Act in question is monstrously arbitrary. In any event this Court does have power to construe the phrase **"such part there-**

of as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse" so as to give it an interpretation consonant with right and justice and place it beyond cavil.

It is true that throughout the ages there have been expounded the ideas of abolition of marriage, communization of women, and State nurture of children. We find such views in Plato's **Republic,** and know such to have been experimented upon by the Third Reich. It is realized that there is an active element in our own country which denounces marriage and family as **bourgeois.** Nevertheless, destruction of marriage and families is not the Public Policy of this country; at least at this time. The sentiment has been and still is Pythagorean rather than Platonic, and in Texas, Pythagorean rather than Pauline.

When it is remembered that the enlightened community property system, and the conception of man and wife as equal ganacial partners, were initiated in the western world by an absolute monarchy, in an age of despotism; it is indeed a strange commentary that they should be overthrown, or undermined, by the most august deliberative body of the great-

est democracy on earth, in the enlightened Twentieth Century.

The Spanish conception of marital partnership is based upon the consideration that a wife is not a bonded servant, or a chattel, but is a worthy, honorable, and dignified companion of man; and upon the theory that every wife who performs her marital duties has thereby contributed equally with the husband in earning the daily bread and in accumulating the family competence.

In England, the cradle of Liberty and Democracy, marriage was viewed otherwise than in tyrannically governed Hapsburg lands. Under the Common Law man and wife are **one,** and the husband is that one. What the husband has or earns is his, and much of what his wife has is **his** also. Her earnings belong to **him.** The earnings of the children belong to **him.** He has the right to sell or give away her very bed. As a matter of charity, perhaps, he cannot sell the clothes off her back. The Common Law conception of marriage necessarily regards a wife as an exalted **bonded** servant. The old phrase **baron et femme,** perhaps correctly expresses the idea. The husband is her lord and master. She is a suppliant, who is taken and supported

for whatever of pleasure or use may be exacted from her. She is a parasite, who, perhaps, earns her keep, but not a share of the profits. She is a person **non sui juris,** and prior to the Nineteenth Amendment was included in the category of "women, minors, idiots, lunatics, paupers, convicts, and regular soldiers."

Both the Spanish and English marital systems found root in the western world. The Texian colonists, who for the most part came from Common Law Lands, found the Spanish system in vogue in Texas. When these colonists obtained independence for Texas they rejected the Common Law system, and retained the Spanish. The community property system has been law of Texas for over three centuries, and the Anglo-Americans have consistently adhered to it, and nourished it, for one hundred ten years.

The Constitution of the United States guarantees that no citizen shall be deprived of property, without due process of law, yet the effect of the Act of Congress in question (as construed by this Court) is to evade the force of such guaranty by limiting the wife's share of the community to what she receives as compensation from her own hire to **third persons,** and to

the part of the community derived from her separate property. The Act itself does not expressly limit the compensation to that received from third persons, and is susceptible to the construction contended for in this argument.

It is the manner of men's thinking, and, perhaps, the Congress and this Court have unconsciously followed it, that whatever is earned is earned by the husband alone; that the wife earns nothing, and contributes nothing towards the family earnings, unless she hires out for wages herself. She is regarded as "living off" of her husband. In other words, she is a parasite, living off her **husband's** earnings; a "kept-woman".

The fact appears to have been overlooked that in an ordinary partnership among men, or among **femes sole,** the fact that one partner transacts the actual business whereby money is brought into the partnership till is not the criterion by which the right to distribution of profits is governed. One partner may be running the office, or keeping the books, or attending to routine matters, while the other is engaged in fabricating or selling the materials, or rendering the services, which actually produces the income. Yet no one would deny the

right of the more secluded partner to his agreed share of the profits, nor deny his real contribution to the earning power of the firm. Several mining prospectors apportion the work incident to the enterprise among them. One of them, who is best qualified, is designated to do the purchasing, cooking, washing, and housekeeping and routine duties, while the others are in the field. Where this secluded member has faithfully lived up to his compact, and relieved his associates of these many and menial duties, no one could question his right to his partnership share; although the finding of the ore is what brings the income and profits. Or if that housekeeping partner be a woman, a **feme sole,** would any deny that because she was a woman she should not have her share of the agreed profits? In the armed services, it is said that eight men in the rear echelon are required to keep a fighting man on the front line. Yet the contribution of the rear echelon is conceded.

In the matrimonial partnership each partner is a **specialist.** The average husband is usually trained in some particular wage earning vocation. The average wife is trained in domestic science and economy, a highly specialized field

To demonstrate the equality of the contributions to the partnership, at least so far as the wife is concerned, answers to the following questions will suffice. What husband, for the same, or even greater wages he is receiving, would be willing to bear children, if nature permitted him? What husband, for the same, or an even greater wage, would be willing to remain at home each day and night of the year and discharge as faithfully and as efficiently the same work his wife is engaged in? What husband for the same, or an even greater wage, would, or could, if he would, devote his entire time to the care and uprearing of children? Or, for instance would do a daily turn at a tub of child's clothing.

Perhaps no husband ever appreciates the contribution made by the wife, or his own utter helplessness, unless his wife becomes invalided, dies, or otherwise leaves him, with a child or children to personally care for. It is seldom that we hear of a husband left in any such plight who is able to both earn the living and personally take care of the children and the household. Yet, many wives who find themselves in similar circumstances have done so. When a husband is so left, he is usually compelled to hire and pay for the labor and services

which his wife performed, and what he receives for the expenditure is not of the same standard. In such circumstances it will become speedily apparent what the real earning power of that husband alone is.

It is submitted that the average wife actually earns of the income received by her husband at least her equal share. There are, of course, wives who contribute little or nothing to the family economy. It might be salutary if such were penalized. But the good wife, by virtue of performance of her marital duties alone, should be held to be entitled to her just half.

The Act of Congress under scrutiny is not consistent with its own theory, or with the standards of plain, common honesty, hence is unquestionably arbitrary. It provides that **whichever** of the spouses dies first the whole of the estate shall be included for taxation in the estate of the decedent. Now, if the wife is to be regarded prima facie, or conclusively, as not being entitled to one-half of the estate because she did not actually perform the identical services for which the salary or wages was paid, or it is held that the character of contribution made by the wife to the marital accretions does

not entitle her in her own right to any share, then if the wife die first, why should **any** part of the community estate, much less the whole, be taxed against the husband who is solely responsible for its accumulations? If the wife has earned her right to one-half of the community estate as provided by the Texas Constitution by simply performing her marital duties, then how can her half be honestly taxed?

The case in the main simmers down to the **quaere** whether or not a wife by performance of her marital duties alone actually earns or contributes in equal proportion to the earning of half (or any part) of the income paid to the husband as the result of their combined efforts in their respective fields. If she has earned or contributed to the earning of the family income, whether or not she rendered the actual service for which the income was paid by third parties, she has a vested right which must be protected by the Constitution of the United States. If the Constitution has lost its potency, the end of democratic institutions in this country is not far off.

The Brief for Appellees in this case presents sound law and supporting authorities. The

writer, however, believes that the aspects of the case set forth in this argument should be brought to the attention of the Court.

The Court is requested to reconsider its decision and to affirm the judgment below.

Respectfully submitted,

HOBART HUSON,
as Amicus Curiae,
(Refugio, Texas).

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 59

THE UNITED STATES OF AMERICA, *Appellant*

vs.

HENRY ROMPEL, JR., ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEX OF ERNST HERBST, DECEASED, *Appellee*

Appeal from the District Court of the United States for The Western District of Texas

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS FOR LEAVE TO ARGUE CASE AS AMICUS CURIAE

GROVER SELLERS
Attorney General of the State of Texas
Austin, Texas

E. Duncan & Co., Brief Printers, Dallas

IN THE

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No. 59

THE UNITED STATES OF AMERICA, *Appellant*

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Appeal from the District Court of the United States for The Western District of Texas

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS FOR LEAVE TO ARGUE CASE AS AMICUS CURIAE

To the Honorable Supreme Court of The United States:

The Attorney General of the State of Texas, as amicus curiae, respectfully represents to the Court:

1.

The above styled and numbered cause is an appeal taken by the United States of America from the judgment of the District Court of the United States for the Western District of Texas in a test suit filed to determine whether section 402(b) of the Revenue Act of 1942 is constitutional, in its application to the community property accumulated under the laws of the State of Texas by a Texas decedent and his surviving spouse. A similar test case (No. 58), involving the community property laws of the State of Louisiana, is pending in this Honorable Court.

2.

A brief of the Attorneys General of various states having community property laws will be filed by such Attorneys General as amici curiae in each of these causes prior to the submission date, as authorized under the rules and procedure of this court. The Attorney General of the State of Texas desires to and will sign and join in said brief in his official capacity.

3.

The question to be determined herein deals with the incidence of the Federal Estate Tax upon property rights of spouses in Texas acquired and held at the time of decedent's death under the marital laws and the community property system of the State of Texas and affects the public welfare in that state.

4.

The Attorney General of the State of Texas desires that oral argument be presented, in behalf of the State, and in support of the aforesaid brief of the Attorneys General.

WHEREFORE, the undersigned, Grover Sellers, attorney General of the State of Texas, files this motion requesting that this Honorable Court grant leave for the presentation of oral argument in behalf of the State of Texas upon submission of this cause and allot additional time for such argument, to be made by him in his official capacity or by such attorney or attorneys (members of the Bar of this Court) as he may designate to appear in such behalf on the submission of this cause.

Respectfully submitted,

.....

GROVER SELLERS
Attorney General of the State
of Texas
Austin, Texas

October, 1945

No. 59

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, *Appellant*,

v.

HENRY ROMPEL, JR.,
ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, *Appellee*.

APPELLEE'S PETITION FOR REHEARING

GROVER SELLERS,
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BOYLE, WHEELER & GRESHAM,

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Attorneys for Appellee

January 25, 1946

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HENRY ROMPEL, JR.,
ADMINISTRATOR DE BONIS NON CUM TESTAMENTO ANNEXO OF ERNST HERBST, DECEASED, *Appellee*

APPELLEE'S PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Appellee herein, as representative of the Estate of Ernst Herbst, Deceased, respectfully petitions that a rehearing be granted in this case and that upon such rehearing the judgment of this Court, reversing the judgment of the Court below, be set aside and that judgment be affirmed.

In the alternative Appellee prays that the Court set the case down for reargument before a full Bench, this case having been originally submitted with only eight of the

justices present and involving constitutional questions of great importance and public interest, embraced in a "test case" (along with the case of FERNANDEZ, COLLECTOR, v. WIENER, Docket No. 58, from Louisiana simultaneously submitted and decided) as to the application of the Federal Estate Tax to State rules of property, such as prevail in Texas and seven other states having traditional community property laws.

In this connection Appellee submits that even if the Court's decision is considered correct so far as the law applies to a husband's estate, the Court should be presented with full argument as to the applicability and validity of the law in the instance of the estate of a wife who predeceases her husband, as hereinafter discussed.

Grounds for Rehearing

As grounds for this Petition your Petitioner submits:

I.

This Honorable Court erred in reversing the judgment of the District Court of the United States for the Western District of Texas, and erroneously held that Section 811 (e) (2) of the INTERNAL REVENUE CODE, as amended by the Revenue Act of 1942, violated neither the due process clause of the Fifth Amendment, the requirement that excises be levied with geographic uniformity, the requirement that direct taxes be apportioned, nor the provisions of the Tenth Amendment forbidding federal invasion of the powers reserved to the several States.

II.

This Honorable Court erred in holding, in a case involv-

ing only the estate of a deceased husband, that (though the Statute involved was inseparable and undertook also to impose a like tax in the event of the prior decease of a wife) the tax upon the interest of the wife in community property on the death of the husband could be upheld because of the termination of his control and power of disposition, and the tax upon the interest of the husband in community property upon the death of the wife could be upheld because she has a remedy for an alienation made in fraud of her rights by her husband.

III.

This Honorable Court erred in holding that Section 811 (e) (2) of the REVENUE ACT OF 1942 had the effect of imposing an Estate Tax on the estate of whichever spouse died first (upon the grounds stated in the preceding assignment) because the section does not purport to impose the tax upon termination of powers of control or disposition on the one hand, or restraints on alienation on the other hand, but expressly imposes the tax "to the extent of the interest therein held as community property by the decedent and surviving spouse," with certain enumerated exceptions, thus clearly imposing the tax in all instances without reference to termination of powers of control or disposition, or restraints on alienation.

IV.

This Honorable Court erred in placing the above construction on Section 811 (e) (2) for the purpose of sustaining its constitutionality since there was no basis in the law therefor, and since amendments of the State Law as to control would

govern the impact of the Federal Tax; if the tax is to be so applied, in disregard of the language of the Federal Law.

V.

This Honorable Court erred in construing Section 811 (e) (2) as imposing an Estate Tax on each spouse's estate where community property is involved, without requiring consideration of the *full* economic contribution of the respective spouses, personally, to the accumulation of such Estate.

VI.

This Honorable Court erred in holding Section 811 (e) (2) to be constitutional without construing the prescribed exception from the gross estate of a deceased spouse to embrace within its scope not only wages and salaries, but all other earnings and economic contributions of the surviving spouse, whether professional, or from business, or manual labor.

Scope of the Court's Holding

This Court recognized that in Texas husbands and wives were the joint and equal owners of all community property.[1] The Court further recognized that the amending section involved here was inseparable, so that if it was invalid in any aspect when applied to the estate of a decedent wife, it was wholly invalid and could not be applied in the case at bar, where the husband was the first to die. The Court, although cognizant of the fact that in many cases an estate tax meas-

[1] In this and succeeding portions of this argument, references will be made primarily to the opinion of the Court in No. 58 **(Fernandez v. Wiener)** because the principal opinion of the Court in the two test cases was delivered in No. 58, but was, by the brief opinion in No. 59, made applicable to it.

ured by the entire community property would exceed the decedent's one-half thereof, upheld the validity of the lien which the statute purports to grant upon all community property to secure the payment of the tax; brushed aside the question of how that burden was to be borne, and left the matter of apportioning the burden to the State having jurisdiction of the administration upon the decedent's estate. This holding, we assume, was made with full cognizance of the fact that if the decedent had no property other than his or her interest in the community estate, any right of reimbursement granted to the survivor would be valueless in those cases where the total tax exceeded the decedent's one-half of the community property.

The Court, in the opinion in No. 58, summarized the wife's right to interfere with the husband's management of that portion of the community property committed to his management, as follows:

> "* * * As we said of Texas community property in Hopkins v. Bacon, 282 U.S. 122, 126, the authorities hold 'that if the husband, as agent of the community, acts in fraud of his wife's rights, she is not without remedy in the courts. * * *' Appellee also concedes that 'excessive and capricious donations are void,' and that malicious or fraudulent intent need not be established in order that the wife shall have the remedies referred to. Appellee does not question that these are the rules generally applicable to community property in Texas."

The Court further recognized that it might generally be true "that *neither the husband nor wife gains any over-all financial advantage* when the other dies."

We think it implicitly, if not expressly, held in the opinion that the principles laid down do not depend for their applicability upon the fact that the decedent and the other

co-owner of the property were husband and wife. These principles are as applicable to property jointly owned by parties not so related as they are to property jointly owned by husband and wife.

The holding of the Court as to the validity of the statute, when considered with respect to the due process clause of the Fifth Amendment, is thus summarized.

> "It is enough that death brings about changes in the legal and economic relationships to the property taxed."

Considered in the light of the other statements of the Court heretofore dealt with, this is a holding that, if the survivor and the decedent jointly owned property and have dedicated all of that jointly owned property to a common enterprise and the decedent had during life the right to require that no part of the jointly owned property be diverted from the common enterprise, the termination of that right upon the decedent's death, whether or not it is of value, or irrespective of the extent of that value, is sufficient to render valid under the due process clause an estate tax levied upon the decedent's estate and measured by the entire value of the jointly owned property and collectible, to an indefinite extent, out of the survivor's share of the property.

In holding that the tax imposed by the Section under consideration in this case did not violate the uniformity clause of the Constitution, the Court disposed of all of the analogous situations pointed out by the appellee upon the ground that considerations of practical administrative convenience and cost in administration would justify singling out community property, and further said that the interests not taxed in such analogous cases are but "isolated specimens of the attorney's art, and likely to resist efforts to identify them with the taxable subject," although MR. JUSTICE

DOUGLAS and MR. JUSTICE BLACK apparently found more difficulty in conforming the Court's holdings to the constitutional requirement of uniformity.

As to the appellee's contention that the tax in some aspects was direct, the Court said:

> "* * * A tax imposed upon the exercise of some of the numerous rights of property is clearly distinguishable from a direct tax, which falls upon the owner merely because he is owner, regardless of his use or disposition of the property."

The applicability of the limitations contained in the Tenth Amendment were disposed of by holding that this Amendment did not limit the taxing power and that the Court could not inquire into the unexpressed motives or purposes of Congress.

Only in the specially concurring opinion delivered by MR. JUSTICE DOUGLAS was HOEPER V. TAX COMMISSION, 284 U.S. 206, referred to, but appellee's contention that a tax was invalid if levied upon A, but measured by the value of B's property, or if B's property was taken to pay A's tax, was disposed of with the statement:

> "* * * Since the levy is an excise and not a property tax, the case is not one of taking the survivor's property to pay the tax on decedent's estate."

Other portions of the opinion upheld the validity of a lien upon the survivor's property to pay the tax on decedent's estate and the quoted statement must have been made in full recognition of the fact that in many cases any right of reimbursement afforded by either state or federal law would be wholly valueless.

In dealing with the appellee's contention that the tax was

otherwise arbitrary and capricious, the Court made no reference whatsoever to the demonstrated fact that, although all of the property might be taxed as a part of the estate of one spouse, the survivor's one-half could, even if the survivor died immediately after the first decedent; be taxed as a part of the second decedent's estate; or, to the demonstrated fact that although all of the community property might be included in the decedent's estate, only one-half of the community debts are allowed as a deduction in computing the net estate (which will necessarily confiscate in many estates, large or small, the entire interest of the survivor, as well as the entire interest of the decedent) or to the demonstrated fact that the survivor's share of the property, although subjected to an estate tax was not granted an increased sale basis equal to estate tax values when any of that property was subsequently disposed of. Likewise, the Court found nothing arbitrary, capricious or confiscatory in imposing a tax levied upon the termination of a right with respect to property, which right might be *valueless or of insignificant value*, but measuring that tax by the entire *value* of the property.

The principles announced by the Court in this case would apparently render valid a death duty, measured in any of the following ways:

1. Upon the death of a partner in an ordinary partnership by the value of all partnership property, regardless of the value of the decedent partner's interest therein;

2. Upon the death of a Trustee whose death terminated the Trust, by the value of all of the Trust property, even though the Trustee did not at death have, and had never had, any beneficial interest therein;

3. Upon the death of the owner of a life estate, upon the

full value of the fee, even though the life tenant did not have at death, and had never had, any interest in the remainder;

4. Upon the death of a wife, resident of a State which gave her dower or similar rights in her husband's real estate, measured by the full value of that real estate.

Many other examples clearly within the scope of the opinion might be given, but we have endeavored to select only a few which could not, we are sure, be classified as "isolated specimens of the attorney's art," and which could easily be identified with the taxable subject.

Ordinary partnerships are clearly within the scope of the Court's opinion, because partnership property is jointly held; the partnership relation is terminated at the death of one partner; and this death brings about changes in the legal and economic relationships of all the members to the partnership property. These changes are at least as great as the changes which occur when the wife in a community property state dies and the husband's share of the community property is relieved of her right to require that all community property be used for the benefit of the community. The ordinary partner as well as a managing partner has at least that right under any conceivable partnership relation, and further in the ordinary partnership has an agency for the partnership and a right to deal with all of the partnership property, to pledge its credit and dispose of assets, much larger than the wife has with respect to the community property entrusted to her husband's management. At death, these rights terminate as to the whole property. So, the Court's holding would make valid a tax levied on the death of a partner who owned a 5% interest in a $20,000,000.00 partnership measured by the entire $20,000,000.00. This tax would exceed $13,000,000.00. The Court's opinion would uphold a lien upon the surviving partners' $19,000,000.00 worth of property to enforce the

payment of at least $12,000,000.00 of the tax, without regard to any right of reimbursement and without regard to whether the termination of the decedent's rights, with respect to the partnership property, was valuable to the survivors, or otherwise. Such a tax, this Court has definitely held, is not a tax upon the survivor's property, although the survivor's property must be taken to pay it. It is not arbitrary or capricious, this Court has said, even though it exceeds by tenfold any possible value which passed or shifted upon the happening of the excisable event, the death of a partner.

The applicability of what was said just above to the trustee-beneficiary and to the life tenant-remainderman situation, which are within the scope of this Court's opinion, is too clear to require restatement. But the dower situation, particularly in its applicability to the question of uniformity merits further discussion. Dower has been expressly abolished in only some fifteen (15) States, and in some of these States there are statutory substitutes therefor.[2] Generally speaking, in no State where dower remains can a husband dispose of his real estate without the joinder of his wife in such a manner as to cut off her right of dower therein. Such a right imposes an important restriction upon the husband's control of the property, which clearly constitutes more of a burden on his use and enjoyment thereof than do the wife's rights in Texas with respect to the husband's share of the community property. In states having dower, the wife must join, even though the transaction be advantageous, in order to convey full title. No such joinder or consent is required in Texas under similar circumstances, save only as to a homestead. The transaction must be fraudulent as to the wife, intentionally or otherwise, before she can intervene. Yet, in spite of all of the above, it has never been suggested that, upon the death of a wife in a State where she has such a right of

[2] **Vernier's American Family Laws**, Volume III. pages 355 to 368.

dower, all of her husband's real estate to which this right applies could be included in her gross estate, either with or without requiring the husband to contribute to the payment of such a tax. The opinion does not deny the right of Texas to adopt and continue in force its community property system. To the contrary, the specially concurring opinion recognizes the fairness of such a system. Nevertheless, the Court upholds the right of Congress to select incidents of that system as the occasion for a tax and holds that the fact that similar or more valuable incidents are terminated by the death of a spouse in another State without tax liability has no bearing either upon the question of uniformity or upon the question of whether or not the statute invades the admitted right of the State of Texas freely to select its own marital property system.

Argument

(Italics supplied for emphasis unless otherwise indicated.)

If Section 811(e) of the INTERNAL REVENUE CODE, as amended in 1942 by adding the phraseology in Section 811(e)(2) should read as the Court has construed it, the language would be substantially as follows:

> "Section 811(e)(2)—Community Interests—To the extent of the interest in community property of the decedent and surviving spouse, which under the laws of any state, territory or possession of the United States, or any foreign country, is under the *control* of the *decedent spouse*, immediately prior to death, or is subject to restraints on alienation which are terminated by the death of the *decedent spouse*."

That is not the way that the Statute reads. The subject of the tax, under the plain language of the statute, is all interest of the spouses in community property, taxable to whichever

spouse dies first, regardless of the existence of control in the hands of one, or restraint in behalf of the other; except such part as may be economically attributable to the surviving spouse within the scope of the prescribed exception, not, however, excepting more than one-half of the whole. The very statement of the exception in the statute proves the rule is applicable to all non-excepted property, entirely without reference to whether there exists either control, or restraint, on the part of the decedent spouse.

The opinion of the majority, expressed by the Chief Justice, uses on page 13 the following language:

> "Apart from the exemption, it is, as we have seen, the shifting at death of the incidents of the property, regardless of origin, which is the subject of the tax."

If so, it is the "unwritten law" which has been declared constitutional and not the written law which would apply if no "incidents of the property" shifted. Nor is it the intended law, as is reflected by the Congressional Report quoted from in Footnote 12 of the majority opinion in the Louisiana case. There it is pointed out that the so-called preferential treatment accorded to the community property states "is due to the fact that all of the property acquired by the *husband* after marriage, *through his own efforts*, in a community-property state is treated as if one-half belongs to the wife.

The words emphasized in the above quotation clearly reflect that Congress was only intending to deal with community property resulting from efforts of an individual spouse (the husband), and had no intention of making the tax applicable to other community property. Whether this intent may have failed by reason of the narrow language of the exception, such failure does not justify the adoption of a precisely contrary theory as the basis for sustaining the tax, on the balance of the whole estate.

The Supreme Court of Texas should be adequate authority as to the rules of property prevalent in this State, and as to the control of spouses over community property here. That Honorable Court in the case of ARNOLD v. LEONARD (114 Texas 535, 273 S.W. 799) said:

> "The Legislature, in defining the wife's rights in and to her separate property and property held in common with her husband, could lawfully deprive the husband of the power granted him for many years to manage and control the wife's *separate property and portions of the community* which were derived from the use of the wife's separate property or from her personal exertions, and could confine the management, control and disposition thereof to the wife alone and could exempt, not only her separate property, but said portions of the community from payment of the husband's debts."

If support is needed for the authority of the above statement, from any other source, it has been furnished by the Honorable Supreme Court of the United States through former CHIEF JUSTICE WHITE, who was an eminent authority on community property law of his native state, Louisiana, and presumably better acquainted with the fundamental conception in all states having community property laws, than lawyers or judges who have not practiced under that system. In the case of WARBURTON v. WHITE (176 U.S. 484) that eminent authority, speaking for this Court with the full concurrence of the full bench of the United States Supreme Court, said:

> "The Legislature could as well have provided that the wife could convey, as the husband; and if it had power to say that either could dispose of the community interest of the other, it could say that neither could do

so. Changing the manner of conveyance did not alter the status of ownership."

This declaration was supported in the case of ARNETT v. READE, 220 U.S. 311, in which case the opinion of this Honorable Court was written by that eminent common law authority, MR. JUSTICE HOLMES.

We have also in support of our position that "control" is not property or an interest therein, and that the shifting of control is not therefore a taxable event, the language and decision of the present Chief Justice of the Court. In the case of REINECKE v. NORTHERN TRUST COMPANY, 278 U.S. 339, this Honorable Court speaking through the Honorable Chief Justice, said, with reference to the taxability of five trusts (wherein the Settlor had reserved the several powers of supervision, voting, control and appointment) "nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. * * * The shifting of the *economic interests* in the trust property which was the subject of the tax was thus complete as soon as the trust was made."

As said in the case of UNITED STATES v. GOODYEAR, 99 Fed. (2d) 523 (C.C.A. 9):

> "The terms 'management and control' are not synonymous with 'possession and enjoyment' * * * illustrated by the situation where an agent manages real property for the owner."

That the mere control and management of property for another, whether the other party be a co-owner in the same property or otherwise, is not a taxable interest, and that the shifting thereof is not an excisable event under the Federal Estate Tax, or within the taxing power of the United States,

was thought to have been authoritatively settled by the Honorable Chief Justice, when, as Attorney General of the United States, he stated that:

> "From the standpoint of a public officer, acting judicially, * * * considering those *principles which must govern the incidence of a Federal Taxing Statute upon a subject matter which is the creation of State Law*, I am unable to find those considerations which would, in my opinion, justify the Government in beginning anew in some other case a juridical controversy which was litigated to a final conclusion in Blum v. Wardell (276 Fed. 226) and in which the Government's position was fully presented." (34 Opinions, Attorney General, 395, and Treasury Decision 3670).

In that opinion it was further said:

> "If the widow takes by virtue of her ownership in community property, which is held by the community *subject only to the power of disposition of the husband*, obviously the Estate Tax has no application."

The limitations expressed by the Honorable Attorney General in that opinion with relation to the Federal Taxing powers could not, of course, be considered to have been made unadvisedly. The opinion makes specific reference to the fact that under the Revenue Act of 1921 "the officials of the Treasury attempted to have a provision inserted making community property a part of the gross estate." Of course the opinion in the case of MOFFITT v. KELLY (218 U.S. 400) had been written and published in 1910, whereas the opinion of the Honorable Attorney General was dated October 9, 1924, and published somewhat later; yet MOFFITT v. KELLY is not mentioned as being inconsistent with the conclusions reached in WARDELL v. BLUM, supra, and also expressed in

the opinion of the Attorney General, despite the fact that it is now one of the cases primarily relied upon by this Court in its decision of the present case.

The opinion in the case of MOFFITT v. KELLY, supra, was also written by CHIEF JUSTICE WHITE, and in view of his familiarity with the laws of his native state and of community property states generally, he was very careful in that opinion to emphasize the right of state courts to determine the character of the wife's interest in community property and its taxability under state law and state constitutions. The opinion in that case contains the following statement:

> "As there was State power to tax, so far as the Constitution of the United States was concerned, the question of whether or not the wife's interest under the circumstances was *correctly subjected* to the tax was a purely State question, not involving any violation of the Constitution of the United States, and which, therefore, we have no right to review, * * * since the nature and character of the right of the wife in community for the purpose of taxation was peculiarly a local question."

It is difficult to understand how this exposition and defense of state rights could furnish the basis for the present decision in "*considering those principles which must govern the incidence of a Federal Taxing Statute upon a subject matter which is the creation of State law.*" This is equally true whether the opinion in MOFFITT v. KELLY be construed (as contended by the Government and suggested in the footnote to the opinion of this Honorable Court in the present case) to deal with the rights of the wife in California as though they had been absolutely *vested property rights*, as distinguished from *vested rights later to receive property* upon death of the husband without other disposition. Cer-

tainly in any event the case cannot be taken as authority for the proposition that the *wife's estate* could have been similarly taxed upon the whole *in the event that she predeceased her husband*, a question not determined there but sought to be determined in the present case.

It is noted that in the case of POE v. SEABORN (282 U.S. 101), involving the application of The Federal Income Tax to community income, reference is made in Footnote 3 to the fact that the opinion of the Honorable Attorney General, above referred to, dealt only with the Estate Tax, but the reference thereto was embraced in certain references to opinions of the other Attorneys General who had passed on the income tax question, and it is presumed that MR. JUSTICE STONE disqualified himself in that case, and in the other related income tax cases from community property states, on account thereof.

As early as 1917 the Treasury Department had ruled that the Federal Estate Tax did not subject the whole community estate to the tax either directly, or as a measure of the tax, even where the husband predeceased the wife. (TREASURY DECISION 2450.) In that decision the distinction between the application of the Federal Estate Tax to community property in Texas as distinguished from its application to joint tenancies or tenancies by the entirety was pointed out by the following statement:

> "If, under the Texas law, property conveyed to a husband or wife during their marriage is taken by each *in entirety*, and in such a manner that it could not be contended that any specific part belonged to either, but that *each was the owner of all*, and upon the death of either no new interest or title vested in the survivor, as is the case in some States, the government, under a strict and technical interpretation of Paragraph C, of Section 202, would perhaps be justified in demanding that the

> whole of the property thus owned be included as a portion of the gross estate of the decedent."

Certainly no one could say that under the community property law of Texas "each was the owner of all, and upon the death of either no new interest or title vested in the survivor," even if the survivor took the whole instead of his or her one-half. On the other hand this can certainly be said of joint tenancies and estates by the entirety existing in the common law states, and also of such community interests as those wherein the wife has a mere "expectancy" as found to exist under the California laws (prior to their amendment in 1927) in the decisions in the cases of UNITED STATES v. ROBBINS (269 U.S. 315), and MOFFITT v. KELLY (supra), regardless of dictum embraced therein as to what might transpire if the wife had a "vested interest."

In the case of POE v. SEABORN (supra), this Honorable Court said:

> "In the Robbins case, we found that the law of California, as construed by our own Courts, gave the wife a mere expectancy * * * ."

The opinion in that case points out that Congress had undertaken on several occasions to pass a law taxing community income to the spouse having management and control of the community property, and it was apparently on the same basis that Congress was asked by the Treasury Department in 1921 to include community property in the gross estate, as mentioned in the opinion of the Honorable Attorney General rendered in 1924 and previously quoted from. It therefore cannot be said that Congress did not know how to frame and adopt legislation taxing community property according to the existence or the passing of the power

of control and management; yet those elements are not mentioned in the 1942 Amendment here involved, which this Honorable Court has held to be constitutional solely upon the theory that the tax is based upon those elements.

In this connection we point out further that in adopting the 1942 Amendments to the estate tax law and the gift tax law, Congress only dealt with the elements of control or management in two instances involving community property. The first instance was under Section 811(e)(4), where reference was made to the inclusion in both estates of insurance policies where the husband was manager of the community, this being designated as one of the "incidents of ownership," sought to be reached under that law. The second instance was under Section 1000(d), where a gift tax was sought to be presumptively imposed upon the husband only, by a provision that gifts of community property "shall be *considered* to be gifts of the husband" except as to those portions over which the wife usually has the *management and control,* such as her earnings and her rents and revenues from separate property of the wife.

It seems to us, therefore, that it requires judicial legislation to make the Federal Estate Tax Amendments of 1942 applicable to the cessation of control upon the husband's death, or the cessation of restraint upon his alienation by reason of the wife's death. Even if such action by the Court were permissible in the instance of statutory construction where the Statute involved was ambiguous, it would not appear to be within the realm of established procedure where, as here, the Statute is clearly mandatory as to the inclusion of the community estate, without any exception that is based upon the control or restraint of either spouse upon the property. Certainly, in any event, such a construction should not be placed upon the 1942 Amendments when it is clear that Congress was fully aware of the possibility of

taxing income or corpus according to the existence or absence of the elements of control and management and disposition. Not only had Congress theretofore considered the taxing of community income on that basis, but it is evident that it included certain insurance in the gross estate by reason of that element and taxed the gift of community property to the husband only, on such basis, excepting only that property over which the wife presumably had control.

The House Committee Report after referring to the alleged "preferential treatment" of community estates as set forth in Footnote 12 of this Court's opinion herein, included the following statement;

> "Your Committee seeks to remedy this situation by providing that such property is includable in the gross estate *of the husband* unless it can be shown to have been received as compensation for personal services actually rendered *by the surviving wife*, or derived originally from such compensation or other separate property *of the surviving wife*."

However, that statement is not embraced in the Court's footnote, but instead reference is there made to the Senate Finance Committee Report. That report contains no such statement as that quoted above from the House Committee Report, but on the contrary entirely omits any reference to husband or wife as such, and only refers to the "decedent and surviving spouse" and says that the law excepts from the tax only "such portion of the community property which is economically attributable to the survivor." Both reports conclude with the following statement:

> "The Statute establishes a uniform Federal Rule for apportioning the *respective contributions* of the spouses regardless of varying local rules of apportionment. State

presumptions are therefore not operative against the Commissioner."

It is perfectly obvious from the foregoing that the true intent of Congress, if such can be considered in any respect to ameliorate the harsh provisions of the Statute as written, was to avoid if possible the *presumption* that all community property was equally earned as well as equally owned, and to permit instead a *determination* as to the "respective contributions of the spouses." It is further obvious that Congress did not realize that under the State laws much community property is accumulated that cannot be attributed solely to either spouse separately and alone, and that, therefore, the exception of the surviving spouse's compensation for personal services, and rents and revenues from such spouse's separately owned property, would not equitably distribute the burden of the tax.

In any event the tax, as construed by the Court, is levied upon events occurring upon the death of either spouse and not upon the acts of or manner of acquisition by either spouse. Certainly "economic attribution" is not an excisable event. Furthermore, economic attribution or contribution is by no means the equivalent of "economic interest." The words "economic interest" as used in the Court's opinion in the instant case and in WHITNEY v. TAX COMMISSION, 309 U.S. 530, as quoted, must refer to a valuable interest or right in the property, or "an equitable interest in the res," as stated in HELVERING v. O'DONNELL, 303 U.S. 370.

If there is no shift of an economic interest at the death of the decedent spouse, there can be no basis for the application of the Federal Estate Tax except in the instance of transfers that may have been made in contemplation of death or intended to take effect in possession or enjoyment at death. On this account, it was held by this Honorable Court

in the case of REINECKE v. NORTHERN TRUST COMPANY, supra, that the Statute would be construed in a manner that would avoid the grave question of constitutional law, which would have arisen if the five trusts wherein the Settlor had reserved powers of management had been held includable in the gross estate of the decedent. In the present case, the Court recognizing this rule of statutory construction and constitutional interpretation, has apparently undertaken to find a reason and a basis for the tax not stated in the law nor contemplated by the Congress. Certainly, this is true as to the *hypothetical* case of the wife's estate which is considered by the Court because of the inseparability of the Statute. There is no basis reflected in the law or in the Committee Reports for the taxation of all community property as a part of the wife's estate, except the statutory ground of her predecease.

It would be interesting to know whether those members of the House and Senate who voted for the passage of the 1942 Amendment to the Federal Estate Tax Law and rejected an Income Tax Law Amendment seeking to tax all community income to the husband because he had control thereof, realized that they were passing a law which would be construed as turning entirely upon the element of control, instead of economic attribution. In any event, we feel sure that it would be startling to such members of Congress to know that the wife's estate would be taxed like the husband's, not because she had control of a part of the community, or testamentary power over a half of the community, or because she economically contributed to its acquisition by the community, but because her predecease "liberates her husband's share from the restrictions which the existence of the community had placed upon his control of it." They would be still more surprised to know that they were supposed to have brought about this result by taking

into consideration "personal and psychological forces which have great importance in the practical determination of how community property shall be managed by the husband. Though it may be impossible fully to translate these imponderables into legal rules * * *."

This Honorable Court, of course, recognizes that it could not "rest decision" on these "imponderables," and therefore emphasizes, in the opinion, events which necessarily result from the death of the wife such as the right of the husband, as to his half, to "partition and to hold it free of all controls." Exactly this same right would result to both spouses, without the death of either, by mere removal of the marital domicile and of the marital assets across a State boundary line, or even a mere investment of community funds in a common law state. In such instances the spouses would become absolute tenants in common with the right of each spouse as to his or her respective share to "partition and to hold it free of all control." Have state rights come to the point where even the selection of a different marital domicile is an excisable event, subjecting to taxation spouses who move from a community property state to a common law state, should Congress see fit to so prescribe.

The case of DEPAS v. MAYO, 11 Missouri 314, is one of the early authorities, that has never been challenged, establishing that courts of the new marital domicile under such circumstances will recognize that the spouses upon moving there become tenants in common as to all community property which they bring with them, and that even as to assets standing in the name of the husband but belonging to the community, he will be considered as trustee for the wife's one-half and immediately accountable as such. This rule is recognized in the AMERICAN LAW INSTITUTE'S RESTATEMENT OF CONFLICTS OF LAWS, Sections 292 and 293.

Even within the community property states the spouses

can become tenants in common, as to what was originally community property, without the decease of either spouse, as for instance in the case of divorce. Have the marriage and divorce laws of the states become so subject to Federal legislation that divorce may be treated by Congress as an excisable event, subjecting both spouses to a tax? Could divorce constitute a taxable event in community property states only, as contrasted with the common law states, without violating the uniformity clause of the Federal Constitution?

The right to partition certainly existed in the joint tenancy involved in the cases of UNITED STATES v. JACOBS, and DIMOCK v. CORWIN (companion cases), 306 U.S. 363. Yet the existence of that right was not considered sufficient to prevent the application of the tax. On the contrary it was the failure to exercise the right of partition, and the continuance of the joint tenancy until the death of one of the spouses, which was deemed to render the property taxable in the gross estate of the decedent. How, then, could the absence of a right to partition and the subsequent creation of such a right by death, change of domicile, divorce or otherwise be the basis of the application of the tax? Clearly, if the right to partition is what prevents the application of a similar tax to tenancies in common, and the absence of such right is what subjects the community property to the tax (at least so far as the wife's estate is concerned), then we must look for another basis to sustain the tax in the JACOBS case, and that basis is found in the "right of survivorship" which does not exist as to community property.

That same factor was the controlling factor in the case of TYLER v. UNITED STATES, 281 U.S. 497, even though it involved an estate by the entirety. The opinion of this Honorable Court in the present case recognizes this by stating that it was not the *source* of the property which was the basis

of the tax in either the TYLER or the JACOBS cases, but the existence of the estate by the entirety or joint tenancy at the time of the death of one of the spouses and the consequent "shift in economic interests" and "definite accession to the property rights" of the survivor. In other words, the survivor in those cases received property (not mere release from control or restraint), none of which (not even one-half thereof) would the survivor or his heirs or legatees have received if instead the decedent had been the survivor. Analogies can therefore not properly be drawn between the present cases and those cases on the ground that all of the cases involved "joint owners of property held in joint ownership." There is a vital distinction between "joint owners," such as were involved in the TYLER and JACOBS cases, and mere co-owners such as exist in the cases of community property and tenancies in common. There the joint owners were owners, each of the whole. Here the co-owners were owners, each of an undivided half interest in the whole.

Immediately preceding the discussion of the uniformity clause in its application to the present cases, the Court's opinion says that it is:

> "The *shifting at death* of the incidents of the property regardless of origin, which is the subject of the tax."

But, upon passing to discussion of the uniformity clause, the Court says:

> "The Amendment *taxing community property interests* is applicable throughout the territory of the United States wherever such interests may be found."

We cannot reconcile these two statements of the Court, nor

can we reconcile the second statement with the next statement appearing under the discussion of the Appellant's contention that the tax was in effect a direct tax on community property interests. That statement reads as follows:

> "An excise tax, which the Constitution requires to be uniform, laid upon the *shifting at death* of some of the incidents of property, could hardly be thought to be a direct tax which must be apportioned."

The subject of the tax is either the "shifting at death of the incidents of the property" as said by the Court in discussing the Fifth Amendment, as well as the "direct tax" contention; or the subject of the tax is "community property" as said by the Court in discussing the Uniformity requirement of the Constitution.

The Court has clearly demonstrated that it sustains the Act under the Fifth Amendment solely on the ground of the shifting of the elements of control and restraint. Those elements exist with reference to property rights in many if not all of the States of the Union, and the Uniformity Clause therefore requires that those elements be taxed similarly "in every place where the subject of it is found." Even in the case of tenancies in common, each tenant has the right to make use of the *whole* property so long as he does not commit waste, and only a partition in life or at death can defeat this right. It will not do to say that even if discrimination exists between the treatment of community property and of tenancies in common this is no violation of the Fifth Amendment or the Fourteenth Amendment, and therefore such discrimination cannot be considered as a violation of the Uniformity Clause. The very purpose of that clause was to prevent discrimination, at least between the States, and in that sense to blend with the Tenth Amend-

ment in the preservation of State rights. If the Court will never apply the Uniformity Clause, except where States or sections of the Nation (such as East, West, North or South), or sections of a State (for instance, one of the five States into which, under the Texas Annexation Resolution, Texas might be subdivided at its option) are enumerated, Congress can always obviate the Clause, as the Court seems to think Congress has succeeded in doing here.

We take it that at least a majority of the Court recognized that A could not be taxed with the property of B, nor his tax measured by the inclusion of B's property and that for this reason also the Court dealt with the so-called taxable incidents arising upon the death of the wife, as well as of the husband, and the resulting "new set of relationships with respect to his share of the community as well as hers." KNOWLTON v. MOORE, 178 U.S. 41, is cited at least twice in the opinion of the majority, and no question is raised about the principle announced there as well as in HOEPER v. TAX COMMISSION, supra. From the case of KNOWLTON v. MOORE, we quote as follows:

> "It may be doubted by some, *aside from express constitutional restrictions*, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those *fundamental conceptions of free government which underlie all constitutional systems.*"

The opinion of this Honorable Court in the instant case, as distinguished from the case of FERNANDEZ v. WIENER, from Louisiana, proceeds upon the assumption that the laws of the two states, relating to community property, are sub-

stantially the same in ultimate effect, and cites the case of HOPKINS v. BACON (282 U.S. 122) as establishing the wife's "restraint" on the husband's "control." HOPKINS v. BACON clearly established that equal ownership of community property existed in the Texas spouses. The same ruling was made in each of the four income tax cases simultaneously submitted and decided by this Honorable Court, involving the community property laws of Texas, Louisiana, Arizona and the State of Washington. However, the opinion in the Louisiana case, involving the income tax, states that "this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income," and as illustration thereof adds: "While the husband is the manager of the affairs of the marital partnership, the limitation upon the wrongful exercise of his power over community property are *more stringent* than in many states which have a community system." The Court then points out that in Louisiana under certain circumstances the wife may bring about an immediate "dissolution and liquidation of the community property," and "an accounting from the husband for community income or property."

In Texas the wife has no right to a partition of the community property (which would amount to an immediate dissolution and liquidation thereof) nor any right to an accounting during the continuance of the marital relation. This is why the Texas Statutes expressly provide for such relief in the event of a divorce suit.

Apparently the Government preferred to submit the case of a wife's estate in Texas under the 1942 Amendment, in the form of a *moot case* as here presented, instead of an actual case which was first presented to the Government by counsel in this case, as the basis for the first test of the validity of those amendments. The Government saw fit in its brief in this case (as distinguished from the Louisiana

case) to review some of the circumstances that led to the selection of this as the test case from Texas, and preparation of the stipulation of facts entered herein. (Appellant's brief, page 16.) The Government did not, however, see fit to refer to the fact that it had refused to permit a test as to the wife's estate *either in advance of this case or contemporaneously* therewith. Fortunately there is record evidence of this in the case of W. M. CASTLEBERRY, INDEPENDENT EXECUTOR OF THE ESTATE OF TILLIE CASTLEBERRY, DECEASED, v. W. A. THOMAS, COLLECTOR OF INTERNAL REVENUE, No. 1396, Civil Docket of the District Court of the United States, for the Northern District of Texas, Dallas Division. The judgment entered therein in the month of April, 1945 (the same month and about the same time that the Government filed this appeal in this Honorable Court) shows that an agreed judgment was entered for refund to the plaintiff of the amount as claimed in the plaintiff's petition, by which a tax calculated on the whole community exceeded the amount of the tax calculated on the wife's half thereof. The petition also shows that all of the property involved was community property, and that none of it had been received as compensation for personal services actually rendered by either the said Tillie Castleberry or W. M. Castleberry (her husband), or from the separate estate of either. This precludes any contention that the husband's half of the community was excluded from the gross estate as coming within the exception of the statute pertaining to the survivor's contribution as now defined. The only grounds for recovery stated in the petition were not based on the existence of the exception in the Statute, but upon the specifically alleged invalidity of the Statute under the Federal Constitution, at least as applied to the wife's Estate. The grounds of invalidity stated in that petition are substantially the same as those asserted herein

under the various articles of the Federal Constitution and Amendments thereto.

We further point out that Texas has a Constitutional provision defining the wife's property, as distinguished from that of her husband. It has been held in ARNOLD V. LEONARD, supra, that this definition of the wife's property is restrictive and prevents attributing to the wife anything acquired after marriage except property received by her through "gift, devise or descent." The same Constitutional provision also requires that laws be passed defining "the rights of the wife" not only in relation to her separate property, but also that "held in common with her husband." This Honorable Court points out that no law has been passed in Texas, as in Louisiana, prescribing any statutory restraint in favor of the wife, against the husband's control of the property "held in common."

The Texas Constitutional provision above referred to is set forth in full on page 114 of our original brief in this Court. The same provision appeared in the Texas Constitution of 1845, 1869, and 1876 (the present Constitution). In each of these Constitutions there also appeared two other relevant provisions, substantially the same as first embraced in the Constitution of 1845, except that the reference therein was to the laws of the State of Texas instead of the Republic of Texas. In addition to Section 19 of Article VII (which is the same as Article 16, Section XV of the CONSTITUTION OF 1876, as quoted on page 114 of our brief), we quote the following from the Texas Constitution of 1845:

> "Article VII, Section 20:
>
> "*The rights of property* and of action which have been acquired under the Constitution and laws of the Republic of Texas, *shall not be divested;* nor shall any rights or action which have been divested, barred, or declared null and void by the Constitution and laws of the Re-

public of Texas, be reinvested, revived or reinstated by the Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution.".

"Article 13, Sec. 2:

"All laws and parts of laws now in force in the Republic of Texas, which are *not repugnant* to the Constitution of the United States, the *Joint resolutions for annexing Texas to the United States,* or to the provisions of this Constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof."

These sections correspond substantially, as aforesaid, to Section 18 of Article 16, and Section 48 of the same Article, of the CONSTITUTION OF 1876.

The joint resolutions for annexing Texas to the United States, referred to in the last quoted provision, were the joint resolution adopted by the Congress of the Republic of Texas on June 23, 1845 (GAMMEL'S LAWS OF TEXAS, Volume 2, page 1225) and the joint resolution adopted by the Congress of the United States in the same year (9 STATUTES AT LARGE, p. 108). Those resolutions prescribe that as a condition to admission to the Union, Texas should adopt a Constitution and submit it for the approval of the United States. The Constitution was submitted and approved with the provisions above stated, and it thus appears that the sovereign nations were blended, each undertaking to respect marital rights and property rights of their respective citizens, as then existing. Surely neither sovereign had in mind that it was delegating to the other the power to destroy; on the contrary by contemporaneous action they were asserting the right to preserve.

But, says this Honorable Court:

> "It has long been settled that an act of Congress, which on its face purports to be an exercise of the taxing power, is not any the less so because the tax is burdensome or tends to restrict or *suppress* the thing taxed. In such a case it is not within the province of Courts to inquire into the unexpressed purposes or motives which may have moved Congress to exercise a power constitutionally conferred upon it."

If this be the rule, then the delegated power to tax is indeed the power to destroy, and the Republic of Texas virtually committed suicide as to the rights it sought to preserve at the time of the annexation in (to use the words of this Honorable Court) "a defined property interest created by State Law, having a common historical origin, a common name, and constituting a universally recognized distinct class of property interest." While the language just quoted is used by the Court in justifying a separate classification of community property rights, in order to subject them to Federal taxation, this would seem only to indicate the Court's view that the power to classify furnishes an unlimited field for what is to be subjected to the power to destroy by taxation. Furthermore, if the intent to destroy the community system because of the alleged discrimination or "preferential treatment" in its favor is not evident from the report of Congress (as we believe it is) and if, as stated in the section of the Court's opinion last quoted, the Court cannot inquire into the "unexpressed purposes or motives" of Congress, we wonder whether the Court is justified in attributing unexpressed purposes or motives to Congress as the basis of supporting the tax, even where it is plain that Congress had no such intent.

If the Court were seeking a statutory construction that would uphold the law, it could give the excepting clause of the 1942 Amendment an interpretation broad enough at least to insure that in a case (such as the instant case from

Texas) where the community estate is found to have been accumulated solely from the joint efforts of the spouses and not from the separate earnings or property of either alone, only one-half of the community estate could be subjected to the tax. This construction is suggested by Charles B. Collins in his recent work entitled "Community Property and Taxes." The author in his comments on page 58 of his original work, with reference to the constitutionality of the Amendment suggested such a rule of construction based on the fact that the wife is "regarded by the law as participating in, and contributing to, the acquisition of all the marital earnings and accumulations." In his later supplement he refers to the pendency of the test cases from Texas and Louisiana, and says:

> "Both cases concern community property that was such in and at its inception. * * * The words 'compensation for personal services actually rendered' do no more than express a basic assumption of the law that the wife, equally with the husband, contributes to the acquisition of community property (Succession of Wiener, 203 La. 649, 14 So. (2d) 475). So read, Section 811(e)(2) harmonizes with the scheme of the Estate Tax Law and the intent of Congress, as expressed in the Report of the House Ways and Means Committee."

In support of this broad construction of the words "personal earnings" or "compensation for personal services," the author cites the Texas case of KERR v. TYLER GUARANTY STATE BANK, 33 S.W. 601, and cases discussed therein, and also refers to the interpretation of the words "earned income" in connection with the repealed provision for an earned income credit.

But if control is to be made the test rather than ownership or economic contribution, is it legal control or actual control that has been read into the minds of Congress? Is

it "legal control" of the paralyzed husband who is unable to exercise it, or actual control of the willing wife who assumes the responsibilities and exercises the control of necessity? Is it the control of the rancher who sells the cattle, or of the wife who sells the chickens and eggs? In the latter instance is the one any more in control than the other, and is either in control of all? And, when the power to control is changed by statute, even if legal control must be considered alone, does the burden of the tax shift with the change of the State law on account of an element that is not named in the Federal law?

Our Texas Courts are in some confusion as to whether the wife controls her earnings, as well as the rents and revenues from her separate property. HAWKINS v. BRITTON STATE BANK, 122 Tex. 69, 52 S.W. (2d) 243. CHANDLER v. ALAMO MANUFACTURING COMPANY, 140 S.W. (2d) 918; POTTORFF v. J. D. ADAMS COMPANY, 70 S.W. (2d) 745 (writ refused by the Supreme Court of Texas). Nevertheless the Statute excepts from the gross estate of a decedent spouse the earnings of the survivor and the revenues from the survivor's separate property. The exception is, as the Court recognizes, merely based on economic contribution of the surviving spouse. Is it not logically necessary, therefore, to assume that the impact of the tax is rested upon the same basis, even if the Court can look beyond the plain wording of the Statute which imposes the tax "to the extent of the interest therein *held as community property by the decedent and surviving spouse*"—not "to the extent of the interest controlled by the decedent."

The case of MOFFITT v. KELLY, supra, involved primarily the application of the contract clause of the Federal Constitution (Article 1, Section 10) to State Statutes of California which sought to impose a tax upon a surviving wife's

share in the community property, as though she had inherited it. The question was also raised as to the application of the Fourteenth Amendment through the "equal protection clause" therein contained, but in the words of MR. JUSTICE WHITE "the latter contention is in substance *but an incident*, and the former is the *fundamental proposition* counted on to procure a reversal."

The application of both sections of the Federal Constitution was denied on the ground that the wife did not have such a *vested* "right to possession and enjoyment" as to prevent the State from having the power to levy the tax.

The Court did not undertake to construe the State Statute, but held that the construction of the Statute was purely a matter for the State Court, saying:

> "But, for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere *designation* affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been *mistakenly* brought within the state taxing law. * * * To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that, on an analysis of the Constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffits, we should conclude that the nature and character of the rights of the wife in the community property, *if correctly interpreted*, were such that, on the death of the husband, the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration."

In dealing with the incidental contention as to the equal

protection clause of the Fourteenth Amendment, the Court said:

> "The contention pressed in argument as to the equal protection of the law clause substantially denies the right of the state to impose any tax on the share of the wife in the community property, resulting from the termination of the community by the death of the husband, or in substance assumes that we have the right to review the action of the state court in deciding that the tax law which it enforced was *applicable*."

The opinion of the California Supreme Court which, on this basis, was affirmed by the Supreme Court of the United States, shows that the wife in California at that time had merely "a mere expectancy" in the community property, even though it was

> "so vested in her that the husband cannot deprive her of it by his will nor voluntarily alienate it, for the mere purpose of divesting her of her claim to it."

In this connection, the Court said:

> "She had rights which may be loosely described as 'vested,' in the sense that the person to whom the rights belonged was not doubtful or uncertain, but positive and known. In this sense only were her rights vested, but those rights never amounted to an estate."

The California Court cited a Louisiana case in support of its ruling (BOYER'S SUCCESSION, 36 La. Ann. 506). It should be noted that the Louisiana Supreme Court in the case of MARSHALL'S SUCCESSION, 118 La. 212, 42 So. 778, held that the Louisiana wife's usufruct was not subject to a similar tax (even though it was defeasible by the will of the deceased husband). Of course, the Texas Court has held

similarly as to the wife's community interest in Texas. (JONES v. STATE, 5 S.W. (2d) 973.)

The California Court further pointed out that the taxing statute "is presumed to have been enacted in the light of such judicial decisions as have a direct bearing upon it." Naturally, the construction in any event must be one which "is at least reasonably possible." REINECKE v. NORTHERN TRUST COMPANY, supra.

Appellees recognize that this Court, as Congress, was led to the justification of the validity of the tax, here involved, upon the grounds that the system of community property creates a tax advantage over the non-community property states. Of course, a complete answer is that the Union took Texas, as well as most of the other eight states, with the community system now in vogue, and if the Union did not like it at that time, then was when its abrogation should have been insisted on, not now.

But returning to the alleged tax advantage, while the persons that gave such information to Congress as is referred to in the concurring opinion, undoubtedly were sincere, for all practical purposes it was founded on a misconception due to the inability to get the true facts as to what extent taxes have been saved in other States, because of each spouse being separately taxed on what each owns. Our brief fully sets out how by removing the wife's disabilities under the Common Law, the husband's estate has been diminished and the wife's increased. Such removal also enables the wife to diminish her estate and increase that of her husband.

It is a matter of common knowledge, that everywhere in the other states, the wealthy spouse takes legitimate steps to increase the wealth of the other at the expense of the wealthier one; such as gifts, particularly of higher yield holdings; taking trades or ventures, particularly the so-called "sure shots," in the name of the other; allowing the more

profitable end of joint ventures to go to the other; partnerships; absorption of all of the family and business expense; intermingling; etc., so that in the course of a married lifetime, the fortunes of the spouses are largely equalized. Thus, all arguments of tax advantage are founded on a fallacy.

Conclusion

In an able address before the Supreme Court of Texas, when a "Nine-Judge Court" was recently installed, the President of the State Bar of Texas, Hon. John H. Bickett, Jr., who named the Committee of lawyers presenting this case here, referred to the glorious history and tradition of our community property system and to the fact that when the Republic of Texas and the State of Texas adopted the common law of England in other respects, they were careful to preserve the community system to govern marital rights. (Referring to GAMMEL'S LAWS OF TEXAS, Vol. 2, page 177, and Vol. 3, page 77.) That was before the decision of this Honorable Court in this case, and we suggest that little did he or the Bench and Bar of Texas expect that the system would now or ever be relegated to the role of a "relic of a by-gone age."

Finally, it is apparent that Congress never conceived that it had the power to tax which is granted it by the Court's opinion, and certainly that it never intended to exercise such a power, particularly in a case in which the wife was the first to die. Instead, Congress, assuming the unreality of the wife's ownership in community property (which reality this Court has repeatedly recognized, and now recognizes), attempted to levy the same sort of tax that would have been levied had the the spouses lived in a non-community property State, in an effort to prevent what Congress called "discrimination." The Court disregards Congressional intention and upholds and requires a system of taxation which will grossly discriminate

against the citizens of community property States and will, in innumerable cases, wipe out the accumulations of married persons in those States whenever the first spouse dies. All of this, we respectfully submit, justifies and requires a re-examination and reversal of this Court's holding.

We therefore respectfully urge the granting of this petition for rehearing and reversal of this Court's judgment, or in the alternative the submission and reargument of this test case before a full Bench.

The Attorney General of the State of Texas joins herein and adopts this petition as amicus curiae.

Respectfully submitted,

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January 25, 1946

We hereby certify that the above and foregoing petition for rehearing is filed in good faith, and not for delay.

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SUPREME COURT OF THE UNITED STATES.

No. 59.—October Term, 1945.

The United States of America, Appellant, *vs.* Henry Rompel, Jr., Administrator De Bonis Non Cum Testamento Annexo of Ernst Herbst, Deceased.	Appeal from the District Court of the United States for the Western District of Texas.

[December 10, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to No. 58, *Fernandez* v. *Wiener*, decided this day. The Commissioner of Internal Revenue, proceeding under § 811(e)(2) of the Internal Revenue Code, 26 U. S. C. § 811(e)(2), as amended by § 402 of the Revenue Act of 1942, 56 Stat. 798, has levied, and appellee has paid, an estate tax on the termination of a Texas marital community by the death of the husband, a domiciled resident of Texas, the tax being measured by the value of the entire community property. All of the constitutional questions raised here were presented and decided in *Fernandez* v. *Wiener*.

Appellee, decedent's Administrator, brought this suit under the Tucker Act, 28 U. S. C. § 761-765, to recover as an alleged overpayment so much of the estate tax paid as is attributable to the inclusion in decedent's gross estate of the value of the wife's share of the community property.

The facts found by the district court were stipulated and are not in dispute. Decedent, a resident of Texas, was married February 12, 1901, and died on November 17, 1943, leaving him surviving his wife, their child, and grandchildren. From the date of the marriage until 1934 decedent's principal activity was that of raising livestock on a ranch in Texas, acquired largely on credit, and paid for out of savings from the ranching business. Other savings from the business were invested from time to time. After 1934 he received rent from the ranch property and income from loans and investments accumulated out of savings. During

the marriage neither decedent nor his wife was ever employed by any one at a wage or salary, and neither received any commissions, fees or similar compensation for personal services rendered. At the time of decedent's death the community property consisted of the original ranch property, investments acquired from savings from the ranch business, rentals and other income from investments.

In the estate tax return for decedent's estate only one-half of the value of the community property was reported. The Commissioner included the full value of the community property in the decedent's gross estate, and assessed a deficiency accordingly, which appellee paid. In this suit which followed, the district court gave judgment for appellee, 59 F. Supp. 483, holding that the tax violated the due process clause of the ~~Fourteenth~~ Fifth Amendment and the command of Article I, § 8 that "all Duties, Imposts and Excises shall be uniform throughout the United States." The Court found it unnecessary to pass on other constitutional contentions presented.

The case comes here on direct appeal under § 2 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. § 349a, appellant assigning as error the district court's ruling that the tax violates the due process clause of the Fifth Amendment and the uniformity clause of Article I, § 8 of the Constitution, and the district court's failure to hold that the tax is constitutional.

Community property has been recognized and defined by the laws of Texas throughout its history.* Its laws governing community property interests are similar in most respects to those of Louisiana described in our opinion in the *Wiener* case, *supra*. On the death of the husband, in Texas, as in Louisiana, the wife's share of the community is freed from the restrictions of his exclusive management and control, and the wife acquires exclusive possession and enjoyment of the property constituting her share, as well as important new powers of control and disposition over it. On the death of the wife, her share passes to her heirs, and his share is freed from the limitations which the existence of the community places on his control of community property. While Texas does not have the statutory restrictions on gifts which are to be found in the Louisiana Civil Code, Texas does place some limitations on the husband's power to make gifts of community

* Speer, Law of Marital Rights in Texas (1929) p. 409 *et seq.*

property. As we said of Texas community property in *Hopkins v. Bacon*, 282 U. S. 122, 126, the authorities hold "that if the husband, as agent of the community, acts in fraud of his wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe*, 15 Tex. 211; *Martin* v. *Moran*, 32 S. W. 904; *Watson* v. *Harris*, 130 S. W. 237; *Davis* v. *Davis*, 186 S. W. 775.)" Appellee also concedes that "excessive and capricious donations are void," and that malicious or fraudulent intent need not be established in order that the wife shall have the remedies referred to. Appellee does not question that these are the rules generally applicable to community property in Texas.

The death of either the husband or the wife of the Texas community thus effects sufficient alteration in the spouses' possession and enjoyment and reciprocal powers of control and disposition of the community property as to warrant the imposition of an excise tax measured by the value of the entire community.

For the reasons fully stated in our opinion in the *Wiener* case we conclude that the tax amendment of § 811 of the Internal Revenue Code authorizing the tax as applied in this case is not open to any of the constitutional objections which have been raised against it either here or below. The judgment is accordingly

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice Black and Mr. Justice Douglas concur in the result for the reasons stated in the concurring opinion of Mr. Justice Douglas in case No. 58, Joachim O. Fernandez, United States Collector of Internal Revenue, appellant, v. Samuel G. Wiener et al.